

*This is our summary of some of the key legal developments across a range of sectors for the week of 7 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

#### Division in the Ranks? Fall Out From P2P Proposals

Last week's Need to Know discussed the Government's proposals to consider disconnection as a final option for illegal file sharing however, since the Statement was published, opposition has been growing and from some unexpected sources. The Featured Artists' Coalition, the British Academy of Songwriters, Composers and Authors and the Music Producers' Guild have said in a statement that they have "serious reservations" about the content and scope of the proposed legislation outlined in the consultation on P2P file-sharing and acknowledged that much online activity surrounding the sharing of music often coincides with a great deal of fan support for the artist concerned. Further, they pointed out that what the consultation's proposals "singularly fail to do is differentiate between the downloading and sharing of music by music fans, on a non-commercial basis, and those who seek financial gain or commercial advantage from such activity". The said this second group of "commercial" P2P users and facilitators should be pursued with the full force of the law but that ordinary music fans and consumers should not be criminalised because of the failings of a legacy sector of business to adapt sufficiently fast to new technological challenges. Accordingly, they "vehemently oppose the proposals being made and suggest that the stick is now in danger of being way out of proportion to the carrot". In contrast, the Creative Coalition Campaign, a new partnership between 16 unions including BECTU, Equity and Pact, and the film, music, TV, publishing and sport industries such as the Motion Picture Association and the Premier League, has called on the Government to force ISPs to implement technical measures against serial infringers such as speed bumps, temporary suspension and, as a final resort, disconnection. In its statement it asked for three key principles to be considered in the drafting - prioritising the policy environment for creative industries; recognising the use of technical measures as an effective and necessary tool in encouraging the legitimate use of the Internet, which should be implemented without delay; and ensuring that measures aimed at changing the behaviour of illegal file-sharers should be graduated and proportionate and accompanied by a fair, fast and effective appeals process.

#### Commissioners' Statement on Google and Book Digitisation

The Commissioner for Information Society and Media and the Commissioner for the Internal Market and Services, have made a joint statement, setting out the important cultural and economic stakes of book digitisation in Europe in the light of the ongoing developments in Google's plans for digitising books for its Google Book Search function. The Commissioners said that a European response was needed to ensure that a regulatory framework was developed, which would recognise and fully respect copyright rules so as to provide authors with fair remuneration and protect their rights. Discussions will now take place with relevant rights holders, libraries and other interested parties, and the Commission will subsequently report to the Parliament and the Council. (*EC Press Release, Memo/09/376, 7 September 2009 - see <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/376&format=HTML&aged=0&language=EN&uiLanguage=en> for details*).

#### OFT Guide on Importance of Competition in Markets and Role of Government

The Office of Fair Trading (OFT) has published a guide for policy makers, which outlines the importance of competition in markets and sets out the rationale behind Government intervention. The guide discusses the role of Government within markets and details the regulatory framework and the types of intervention that the Government may use in order to achieve a desired outcome and also discusses the various risks associated with any such intervention. The OFT said that, left to themselves, markets do not always deliver the best outcomes for consumers or businesses and accordingly, the Government has a legitimate role in shaping them to correct failures or achieve specific policy objectives. The guide acknowledges that whatever the objective may be for Government intervention, its effects on long-term market dynamics are often hidden and only manifest themselves over time and the point was made that competition authorities and sector regulators have a key role in assisting the Government to "think through" the market impacts of any proposed interventions. See [http://www.of.gov.uk/shared\\_of/business\\_leafllets/general/OFT1113.pdf](http://www.of.gov.uk/shared_of/business_leafllets/general/OFT1113.pdf) for the guide.

#### New Legislation - Enterprise Act Merger Fees Order

The Enterprise Act 2002 (Merger Fees) (Amendment) Order 2009, SI 2009/2393 comes into force on 1 October 2009. The Order amends the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370 and increases (rather significantly) the amount of fees payable by enterprises for the regulatory consideration of qualifying mergers in each of the three fee bands. No changes are made to the number of fee bands or to the turnover levels used to determine which band the merger will fall into. The revised fees will be payable at the higher rate if the decision or reference is made on or after 1 October 2009. See [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20092396\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092396_en.pdf) for details.

### ECJ Rule on Right to Charge Consumers for Use of Returned Goods

The ECJ has ruled on a reference from the Amtsgericht Lahr (Germany) that a German law allowing suppliers to charge consumers for the use of goods they return under their right to cancel in Directive 97/7/EC on the protection of consumers in respect of distance contracts is not compatible with the terms of the Directive. The company, Stefan Krüger, which operated an Internet-based mail order business, had placed general terms of contract on the Internet, which stated that a purchaser would be liable to pay compensation in respect of any deterioration in goods' value as a result of their use for their intended purpose. The ECJ said that the Directive aims to give consumers the chance to inspect goods that they have not seen and charging them for using goods they return under the terms of the Directive would deter them from making use of their rights under the Directive. However, the ECJ did say that if a consumer's use offended principles such as good faith, or caused unjust enrichment, then a supplier might be able to charge the consumer. The case has now been returned to the German Courts for further consideration. (*Pia Messner v Firma Stefan Krüger, Case: C-489/07* - see <http://www.bailii.org/eu/cases/EUECJ/2009/C48907.html> for the judgment).

### Commission Survey into Internet Sales Identifies Concerns Over Consumer Rights

Still on the subject of consumers' rights when buying goods online, the European Commission has published the results of a study which shows that 55% of the 369 websites selling electronic goods which had been monitored presented "irregularities". The Consumers Commissioner said, "This is a Europe-wide problem which needs a European solution. There is a lot of work to be done in the months ahead to clean up this sector. Europe's consumers deserve better" - the most common irregularity concerned the provision of wrong information about consumers rights when buying goods online. According to the Commission's figures, more than one-third of all complaints regarding online sales handled by European authorities in 2007 related to the sale of electronic equipment. (*EurActiv, 20 September 2009 - at the time of writing, no further details about the survey were available*).

### OFT Awareness Campaign for Consumers Buying Event Tickets Online

The OFT have also announced the launch of its "Just Tick It" awareness campaign, which seeks to warn consumers about fraudulent ticket websites. The OFT said according to the results of a recent online survey of 3,000 UK consumers, one in five people know someone who has bought tickets to a music, sport or theatre event from a scam ticket website, one in twelve ticket buyers admitted to having been caught out by scam ticket websites, with 80% of those having fallen victim in the last year, and victims lost an average of £80 each. The campaign sets out some practical guidance for consumers to follow when purchasing tickets for events online and also gives advice about what to do in the event that a consumer is scammed. (*OFT Press Release 112/09, 10 September 2009 - and see the Need to Know of 20 July 2009, which outlined the OFT's agreement with STAR for model terms and conditions for consumers buying tickets*).

## Broadcasting

### BBC Trust Announce Review of Audio and Music Compliance Procedures

The BBC Trust has announced that it will be undertaking an independent review of the BBC's compliance procedures in audio and music and whether it has done enough to toughen them up after "Sachsgate". The review team will be asked to address three specific issues - the degree to which the measures adopted by the BBC address the shortcomings exposed by the events leading up to the broadcasts, as well as the broadcasts themselves; the effectiveness of the implementation of the measures, including an assessment of the adequacy of any training or other form of promulgation, aimed both at the in-house and the independent production community with a focus on the understanding of risk and clarity as to responsibility at all stages of the process; and the adequacy of the BBC's plans to monitor their implementation, to ensure that any necessary modifications are adopted. They will report to the Trust Executive later this autumn and a full report will be published in early 2010. (*See also the latest Entertainment Law Review, which contains an article analysing the findings of the Ofcom Sanctions Committee when it fined the BBC for the affair and the factors which led to the level of the financial penalty* - "

*Russell Brand - A Flouting of the Boundaries of "Taste" [2009] Ent LR 20(7), 261 - the article is available via Westlaw).*

## Corporate

### Pro Forma Circular for Shareholders' Rights Regulations and Related Amendments

The City of London Law Society has published a pro forma circular which describes the changes to articles of association to reflect the changes to the Companies Act 2006 as a result of the implementation of the Companies (Shareholders' Rights) Regulations 2009 in August 2009 as well as the provisions of the Companies Act 2006 which will come into force on 1 October 2009. See <http://www.citysolicitors.org.uk/FileServer.aspx?oID=641&IID=0> for details.

### New Legislation - Companies Authorised Minimum Regulations

The Companies (Authorised Minimum) Regulations 2009, SI 2009/2425 come into force on 1 October 2009. The Regulations provide a euro equivalent for the £50,000 minimum capital requirement for public limited companies under the Companies Act 2006 as well as rules for judging whether companies whose capital is denominated in more than one currency meet the minimum capital requirement. See [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20092425\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092425_en.pdf) for details.

### New Legislation - Unregistered Companies

The Unregistered Companies Regulations 2009, SI 2009/2436 come into force on 1 October 2009. The Regulations apply specified provisions of the Companies Act 1985 and the Companies Act 2006 to certain companies that are not incorporated under any of the Companies Acts. Unregistered companies, (incorporated companies not formed or registered under the Companies Acts or under any other public general Act of Parliament (eg, companies formed under private Acts of Parliament, Royal Charter and letters patent)), are subject to certain provisions of the companies legislation. See [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20092436\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092436_en.pdf) for details. (The accompanying Explanatory Memorandum notes that the exact number of unregistered companies is not known. It says it is believed that most were formed by Royal Charter and that while over 900 such companies have been formed since the 13th Century, many are now defunct. About 400 are still actively within the purview of the Privy Council - however fewer than 50 unregistered companies have, in recent years, filed documents with Companies House, as required by the 1985 Act).

### New Legislation - Companies Authorised to Register Regulations

The Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437 come into force on 1 October 2009. The Regulations make provision to enable companies that were not formed under the Companies Acts to apply for registration as a company under section 1040 of the Companies Act 2006 and provide that, once registered, any such company will be treated for the purposes of the application of the Companies Acts in the same way as a company formed and registered under the Companies Acts. See [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20092437\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092437_en.pdf) for details.

### New Legislation - Registrar of Companies Fees for Limited Partnerships and Newspaper Proprietors

The Registrar of Companies (Fees) (Limited Partnerships and Newspaper Proprietors) Regulations 2009, SI 2009/2392 also come into force on 1 October 2009. The Regulations make new statutory fees to be charged by the Registrar of Companies for document registration functions in respect of limited partnerships and the register of newspaper proprietors and for the dissemination of information in respect of limited partnerships. Companies House holds 530 entries on the register of newspaper proprietors. See [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20092392\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092392_en.pdf) for details.

## Gambling

### ECJ Rule in Bwin Online Gaming Monopoly Case

In what has been one of the most anticipated rulings of late, the ECJ has delivered its judgment in the Bwin Liga case, which sought the courts ruling on the interpretation of Article 49 on the restrictions on Member States freedom to provide services in the context of offering games of chance over the Internet. The case was referred to the ECJ after a court in Portugal fined Bwin and the Liga Portuguesa de Fuetbol Profissional for infringing Portuguese legislation governing the provision of games of chance over the Internet. The parties appealed the

fines. In Portugal, the organisation and operation of games of chance falls within the responsibility of the gaming department of Santa Casa, which is authorised by the State and relevant legislation to provide games of a social nature over the Internet. Liga had an Internet site which allowed users to access the Bwin site, making it possible for the users to use Bwin's gaming services - Bwin is an online gambling site, registered in Gibraltar and has no establishment in Portugal. The ECJ noted that "the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States" and that in the absence of Community harmonisation in the field, it was for each Member State to determine in those areas, in accordance with its own scale of values, what was required in order to ensure that the interests in question are protected. Further, Article 46 allows restrictions justified on grounds of public policy, public security or public health - the mere fact that one Member State had opted for a system of protection which differed from that offered in another did not affect the assessment of the need for proportionality. In this case, the court recognised "that limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime in the context of such operation" and referred to the long established history of Santa Casa in operating games of chance. The ECJ said "it must be acknowledged that the grant of exclusive rights to operate games of chance via the Internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators". Further, "a Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the Internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators". Accordingly the ECJ ruled that Article 49 did not preclude legislation from prohibiting operators such as Bwin from offering games of chance via the Internet within the territory of a particular Member State - the matter is still ongoing before the Portuguese courts. Bwin said in response that online bookmakers were more than able to prevent fraud and referred to the Code of Conduct developed by EGBA and said that EU law had failed to keep pace with the progression of online businesses. Not surprisingly, the RGA described the ECJ's assertions about remote gambling as "unfounded and unsubstantiated" and both the EGBA and RGA said that the Portuguese restrictions were not necessary to achieve its objectives and that the retention of a monopoly system was disproportionate to any perceived risks. (*Liga Portuguesa de Futebol Profissional & Bwin International Ltd, formerly Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, Case C-42/07* - see <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&jurcdj=jurcdj&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALLTYP&numaff=&ddatefs=2&mdatefs=9&ydatefs=2009&ddatefe=9&mdatefe=9&ydatefe=2009&nomusuel=&domaine=&mts=&resmax=100&Su> for the judgment - *Bwin's statement about the current regulatory environment for gaming looks to be even more apt in the circumstances - "In light of the fact that there is no clearly defined legal framework for online gaming in most countries and market access for private operators is restricted in most cases to protect state monopolies, the industry is characterised by a certain degree of legal precariousness"*).

### Danish Supreme Court Confiscates Poker Winnings

The Danish Supreme Court has ruled that the 194,000 kroner won by unemployed Danish man playing poker online must be confiscated as Danish law prohibits the earning of a living from gambling. Despite the fact that the computer servers used to run the poker games were placed outside of Denmark, the individual computer used to play was located in the country and was therefore subject to Danish law. According to reports, the Crown Prosecution emphasised that the court's decision does not outlaw online gambling. (*Ministry of Foreign Affairs of Denmark, General News, 9 September 2009*).

## Music

### Copyright Tribunal Rules on VPL's Rates

The Copyright Tribunal has ruled in favour of music television company CSC Media Group Limited in its royalty rate dispute with Video Performance Ltd (VPL). VPL licenses the public performance of music videos. The Tribunal reduced the royalty that the music TV operator pays for broadcasting music videos. CSC, which broadcasts music TV channels argued that the licensing regime operated by VPL was "unfair and unreasonable", and that VPL's proposed royalty of 20% of gross revenue was "unreasonably high". The Tribunal ruled that the royalty rate should be reduced to 12.5% of gross revenue - CSC had argued for 8%. VPL will also have to make further changes to its licence terms. VPL said it "fundamentally disagreed" with a number of the key conclusions that led the Tribunal to make its decision.

## Publishing

### FAEP and ENPA Warn Commission About Press Sector Difficulties

The Presidents of the European Magazines (FAEP) and Newspapers Publishers' Association (ENPA) have informed the European Commission about the current difficult economic and financial situation of the press sector in the EU Member States. According to data collected by the ENPA, advertising revenue for Europe's press fell between 20% and 50% in July and August. This is the worst drop ever recorded, according to the ENPA. ENPA's Executive Director said, "The worst falls affected Central and Eastern Europe. Newspapers in countries like Poland, Hungary or the Czech Republic recorded a 50% decrease in their advertising revenues ... In Northern Europe revenues shrank by 20%, while in Southern Europe by 35%". The Presidents also drew the attention of the Commissioner for Information Society and Media to the current and most urgent challenges which need an immediate and appropriate response from the EU institutions, including the relationship between Google and the publishing industry and mandatory advertising requirements. ENPA and FAEP did say that they welcomed the Commissioner's confirmation to support and protect advertising revenues as an essential source of finance for a free and independent press, in print and online. See [http://www.euractiv.com/29/images/ENPA\\_FAEP\\_Commissioner\\_Reding\\_10092009-1\\_tcm29-185350.pdf](http://www.euractiv.com/29/images/ENPA_FAEP_Commissioner_Reding_10092009-1_tcm29-185350.pdf) for details.

## Technology

### Commission Opens Investigation into Sun/Oracle Acquisition

The European Commission has announced that it has opened an in-depth investigation under the EU Merger Regulation into the planned acquisition of US hardware and software vendor Sun Microsystems by Oracle Corporation, a US database and application software company on the grounds that the deal could harm competition in the database market due to increases in the price of database software. According to the Commission, the proposed transaction would bring together two major competitors in the market for databases. The database market is highly concentrated with the three main competitors of proprietary databases - Oracle, IBM and Microsoft control approximately 85% of the market in terms of revenue. Oracle is involved in the development, manufacture and distribution of enterprise software, including middleware, database software and enterprise applications software and related services, and Sun is active in standards-based computing infrastructure, including enterprise computing systems, software and storage. The Commission's preliminary market investigation had shown that the Oracle databases and Sun's MySQL competed directly in many sectors of the database market and that MySQL was widely expected to represent a greater competitive constraint as it becomes increasingly functional. The Commission's investigation also showed that the open source nature of Sun's MySQL might not eliminate fully the potential for anti-competitive effects. (*EC Press Release IP/09/1271, 3 September 2009*).

## Consultations & Reports

BIS Consultation - Overhead Deployment of Telecommunications Cables. A Consultation on Whether it is Appropriate to Amend the Electronics Communications Code - <http://www.berr.gov.uk/files/file52419.pdf> (the independent Caio Review into the barriers to investment in next generation access (see [http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/caiofinal\\_120908.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/caiofinal_120908.pdf) for the Final Report) identified that they deployment of fibre overhead would make the business case stronger, due to the disproportionate costs of the civil works required to lay all cables underground, and recommended that the Government consider whether overhead deployment would enhance the business case for telecommunications companies - the BIS consultation paper sets out questions about whether it would be appropriate to relax restrictions on the overhead deployment of communications cables in order to encourage faster and wider rollout of next generation super fast broadband in areas that might not otherwise be covered by these services)

Ofcom Statement - Review of ITV Networking Arrangements - Compliance and New Media Rights - [http://www.ofcom.org.uk/consult/condocs/itv\\_network2008/statment/nwa\\_2008.pdf](http://www.ofcom.org.uk/consult/condocs/itv_network2008/statment/nwa_2008.pdf) (the statement outlines Ofcom's conclusions on the organisation of compliance of programming for the ITV1 network service and inter-licensee arrangements for the acquisition of new media rights, including details of modifications required - the review focused on two main issues - the arrangements for compliance of Channel 3 network programming, and the arrangements for ensuring transparency in relation to new media rights acquired by ITV Network on behalf of all the licensees - note however that ITV has raised specific concerns about this - it said "ITV plc could be liable for up to 92% of any sanction for programmes it has not itself complied. As a result ITV plc is now obliged to take steps to protect itself from exposure to sanctions arising from compliance processes in respect of which it currently has no control, and little visibility. ITV plc therefore is notifying ITV Network Limited that from today it will be overseeing and verifying the compliance processes undertaken and advice given by any non-ITV plc owned licensee appointed as the Compliance Licensee" - see

<http://www.itv.com/presscentre/pressreleases/corporatepressreleases/itvresponsetoofcom/default.html> for their statement)