

This is our summary of some of the key legal developments across a range of sectors for the week of 29 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

FAC Statement on P2P Proposals

The Featured Artists Coalition (FAC) has announced that it has "voted overwhelmingly to support a three-strike sanction on those who persistently download illegal files, sanctions to consist of a warning letter, a stronger warning letter and a final sanction of the restriction of the infringer's bandwidth to a level which would render file-sharing of media files impractical while leaving basic email and web access functional". This statement purports to end what was becoming an increasing divided and vocal divergence of opinion on the Government's proposals to deal with P2P file sharing. The Government has said that it remains committed to pushing for the "toughest possible measures" to be employed against illegal filesharers after what some commentators have described as a policy of undermining the credibility of those opposed to suspending Internet accounts. (*FAC Statement, 24 September 2009 - The FAC campaigns for the protection of performers' and musicians' rights. They say they "want all artists to have more control of their music and a much fairer share of the profits it generates in the digital age" - in contrast, independent watchdog Consumer Focus has said the debate on illegal filesharing should focus on the reform of the UK's copyright licensing system and not on "punitive enforcement measures" - they have said they do not condone illegal file sharing, but instead see it as the "inevitable consequence of the music industry's failure to meet consumer demand"*).

UK Music's Response to P2P Consultation

UK Music have also published their response to the Government's Consultation on legislation to address P2P file-sharing. They said they "welcome the recognition by Government that urgent action is required to address the unsustainable levels of online infringement" and "recognise that ISPs need to play an integral part of any solution" (but see below for the ISP's latest views). They support the proposal that the Secretary of State would be able "to direct Ofcom to carry out preparatory work on the mechanics of introducing technical measures" and "direct Ofcom to introduce the measures they had determined were effective and proportionate". They agree that a clear distinction should be made between how technical measures are applied to a casual infringer compared to how they are applied to an egregious or persistent infringer, with temporary suspension of broadband accounts being applicable only as a last resort against the latter. See http://www.ukmusic.org/files/Consultation_on_p2p_filesharing_Uk_Music_response_final_29th_Sept_09.pdf for further details.

ISP's Views on P2P Proposals

Perhaps not surprisingly, the Internet Service Providers (ISPs) have a different view on the P2P disconnection proposals - leading ISPs including BT and Carphone Warehouse owned TalkTalk have said that they are determined to oppose any rule by the Government that would force ISPs to disconnect Internet users who are suspected of illegal file sharing. The comment was made by Carphone Warehouse's Chairman that what was being proposed was "wrong in principle" and would not work in practice. The Chairman said, "The unintended consequence of Mandelson's plan will be to encourage more wi-fi and PC hijacking and expose more innocent people to being penalised wrongfully". He also said that the company would refuse to slow down or cut off customers suspected of illegally downloading music or films, unless ordered to do so by a judge. Carphone Warehouse has announced that it is working on introducing parental controls within its network, so a household can decide whether it wants to have ratings such U, 14 or 18 certificate or unclassified. By selecting either the U or 14 options computers would be blocked from accessing certain filesharing sites such as the Pirate Bay, as well as pornography and gambling, without having to install extra software on a computer (and if they don't then what?). In contrast however, BskyB has said that it agrees with the proposal of disconnection as a "final resort", but says "due process must be followed" and an "impact assessment and proportionality test" must be applied in each case within a "judicial or quasi-judicial framework" and that the number of warnings a transgressor would receive before facing technical measures be "capped" (sound familiar?). As the consultation period for the Government's proposals has only just closed, the response will be awaited with some interest!

WIPO Announces Simplification of International Design Registration System

The World Intellectual Property Organization (WIPO) has announced that member states have moved to simplify the international design registration system by suspending the earliest of the three Acts that govern the Hague Agreement concerning the International Deposit of Industrial Designs of November 1925 - the Hague Agreement consists of three different Acts - the London Act of 1934, the Hague Act of 1960 and the Geneva Act of 1999. The London Act will be suspended with effect from 1 January 2010 and this means that the administration of the Treaty will be simplified, allowing Member States to protect designs in several countries by filing a single application in one language and pay only one set of fees in one currency (Swiss francs). (*WIPO Press Release PR2009/610, 25 September 2009*).

OFT Policy Statement on Self-Regulation in Consumer Protection Work

The Office of Fair Trading (OFT) has published a Policy Statement on the role of self-regulation in its consumer protection work. The Statement sets out the OFT's beliefs that "self-regulation offers benefits for consumer protection and adds real value to the functioning of efficient markets". The OFT defines "self-regulation" in the Statement as "initiatives by groups of businesses within an industry to modify their behaviour in order to improve quality standards". They said the term does not cover industry-led initiatives aimed at achieving or improving compliance with competition law. See http://www.offt.gov.uk/shared_offt/reports/consumer-policy/oft1115.pdf for the Statement, which includes a detailed analysis of the application of the approach in practice, including examples of the form that engagement with self-regulation may take, and the limits of such engagement and the key points it will consider when determining its engagement with any individual self-regulatory initiative or existing scheme.

OFT Consults on Revision of Guidance on Exceptions to Duty to Refer Mergers

The OFT has also published a draft guidance consultation document on exceptions to its duty to refer and accept undertakings in lieu in merger situations and is inviting comment on revised guidance on the exceptions to its duty to refer and its ability to accept undertakings in lieu of reference to the Competition Commission. In particular, the OFT is considering amending the guidance on the "de minimis" exception to take account of its decisional practices since November 2007 and a general updating of the OFT's practice in undertakings in lieu cases, including in particular an explanation of the OFT's approach in some cases to requiring an upfront buyer in relation to divestment undertakings. See http://www.offt.gov.uk/shared_offt/consultations/oft1122con.pdf for details. The OFT has said that it expects to publish revised guidance in early 2010.

Broadcasting

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published with details of adjudications on breaches of Rules 1.4 (the most offensive language must not be broadcast pre-watershed), 2.2 (items or portrayals of factual matters must not materially mislead audiences), 9.9 (credits on radio must be short branding statements) and 10.2 (advertising and programme elements must be separate) of the Broadcasting Code. Ofcom also ruled on breaches of Rule 4 of COSTA (time devoted to television advertising must not exceed 12 minutes in an hour), Licence Condition 11 (retention and production of recordings) and Licence Condition 8 (Part 2 General Conditions) of a restricted service licence. See http://www.ofcom.org.uk/tv/obb/prog_cb/obb142/Issue142.pdf for details.

Corporate

ICSA Guidance on Statements of Capital

The Institute of Chartered Secretaries and Administrators (ICSA) have published guidance on statements of capital, which from 1 October 2009, will be required by the Companies Act 2006 (either as a stand-alone filing at Companies House, or as an integral part of another form) at various stages in a company's life. The guidance acknowledges that for certain companies, providing the requisite details may be difficult - the BIS may undertake a review in the future to determine whether amendment of the Companies Act 2006 or Companies House forms will be required however, in the meantime, the guidance sets out practical advice for companies facing these issues; the guidance also includes the BIS' advice on what companies should do if they cannot identify the premium on individual shares - the BIS guidance says companies should "provide numbers in their statements of capital that provide a pragmatic allocation of their share premium reserve between shares or classes of shares" and refers in turn to the ICSA guidance - see http://www.icsasoftware.com/dl/090925_statement_of_capital.pdf for details.

1 October 2009 - The Biggest Overhaul of Company Law, Ever ...

Just in case you missed it or forgot the significance of the date, BIS has published a release about "the biggest overhaul of company law", which occurred on 1 October 2009 when the final sections and not insignificant sections of the Companies Act 2006 were brought into force. PLC have also published a helpful timetable of implementation - see <http://corporate.practicallaw.com/8-207-2067>, if anyone cares to be reminded of the process.

New Legislation - Amendment of Allotment of Shares and Right of Pre-emption Provisions

The Companies Act 2006 (Allotment of Shares and Right of Pre-emption) (Amendment) Regulations 2009, SI 2009/2561 came into force on 1 October 2009. The Regulations amended provisions of the Companies Act 2006 relating to the exercise by the directors of a company of the company's power to allot shares and to the qualified right of pre-emption which the existing shareholders of a company have when the company allots equity securities as they apply to both public and private companies so as to correct errors in the relevant provisions (sections 560 to 577 of the Companies Act 2006 were intended to continue these rules on pre-emption rights, replacing the corresponding provisions of the Companies Act 1985 and the Companies (Northern Ireland) Order 1986, but they were defective their application). See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092561_en.pdf for the Regulations.

FSA Handbook Amended to Reflect Companies Act Changes

The Financial Services Authority (FSA) has published the Companies Act 2006 (Consequential Handbook Amendments No 3) Instrument 2009 (FSA 2009/50). The Instrument amends the FSA Handbook to implement the final sections of the Companies Act 2006 that came into effect on 1 October 2009 and replaces references to the Companies Act 1985 with references to the relevant provisions in the 2006 Act. The Instrument came into force on 1 October 2009. See http://fsahandbook.info/FSA/handbook/LI/2009/2009_50.pdf for details.

Directors' Declarations on Insurance Contract - Whether Contract Void for Misrepresentation

The claimant company had entered into an insurance contract with the defendant insurer. The claimant had answered a question on a policy regarding a director's bankruptcy and insolvency negatively and did not disclose that a director was a director of another company in administrative receivership. The defendant contended that there had been a misrepresentation and sought to have the contract declared void. At issue was whether the question on the insurance policy related only to the insolvency of the claimant, or whether it related to the insolvency of any company and whether a subjective or objective test should be applied in considering the validity of the policy. The claimant's application for summary judgment for the grant of relevant declarations was refused and the claimant appealed. The High Court noted that in the context of insurance contracts, objective construction reigned supreme and subjective understanding was irrelevant. Where the grammar and the syntax were clear they had to be followed, unless the court was satisfied that "something had gone wrong with the language" - that was not the case here. The literal construction made good commercial sense. It said that it was not surprising that the defendant had not asked questions about other companies with which the claimant's directors had been involved since insolvency was not a risk which was insured against even as regards the insured and the directors. The appeal was allowed and the court said that claimant was therefore entitled to assume that the defendant was not interested in the financial position of other companies in which the directors were or had been involved. (*R and R Developments Limited v Axa Insurance UK plc [2009] All ER (D) 150 (Sep)* - only a digest of the case is available, via LexisNexis).

Gambling

BHA Report on Economic Impact of Racing

The British Horseracing Authority (BHA) have published the study by Deloitte on the economic impact of British racing - the detailed study showed that racing is second only to football in terms of its economic impact on the UK economy. The tax revenue from racing amounted to some £1.5 billion over the last five years, with capital investment of over £700 million in the same period and saw a compound annual growth rate of 6.3%. The BHA made the point however that the report also highlighted the fact that there is great the disparity regarding the returns to the sport from betting compared to other major racing nations - it has the second highest betting turnover of the major racing nations yet receives the lowest return by far from the betting industry. The betting industry generated over £5.5 billion in gross winnings from British racing over the last five years to 2008/09, of which £513 million was paid to racing via the Levy. Racing generates a large majority of its direct revenue from

betting via the 10% (with some exceptions) statutory Levy on British betting operators' gross wins from British racing. The majority of Levy receipts are allocated to fund either prize money or integrity services. The Report stated "Racing continues to argue that it does not receive an adequate or fair return from the betting industry given the value of its product. Furthermore, the current structure of the Levy (itself a product of 1960's legislation) is seen by racing as working against an efficient negotiation between the Racing and Betting industries, and hence in need of major reform or replacement". See http://www.britishhorseracing.com/resources/media/publications_and_reports/Economic_Impact_of_British_Racing_2009.pdf for the Report.

Litigation

MoJ Report on Judicial and Court Statistics for 2008

The Ministry of Justice (MoJ) has published its report "Judicial and Court Statistics 2008", which presents a comprehensive set of statistics on judicial and court activity in England and Wales during 2008. According to the report, in 2008 some 71 appeals were presented to, and 96 disposed of by the House of Lords and in the Civil Division of the Court of Appeal 1,215 final appeals were disposed of (44% of which were allowed); further, 259 defamation claims were filed in the Queens Bench Division - see <http://www.official-documents.gov.uk/document/cm76/7697/7697.pdf> for the Report.

Music

Turning the Volume Down - Commission Announces Measures to Deal with Hearing Loss from Personal Music Players

The European Consumer Commission has announced new measures that will be implemented to minimise risks to consumers' hearing from damage caused by excessive volume on personal music players. The Commissioner referred to advice from the EU's independent Scientific Committee which stated that there was "real cause for concern". The Committee said that between 5 and 10% of personal music player listeners risked permanent hearing loss if they listened to a personal music player for more than one hour per day each week at high volume settings for at least five years. The Commission will therefore issued a mandate to the European Standardisation bodies to develop new technical safety standards for personal music players in order to minimise the risk of hearing loss. The new safety standards have two key requirements - all personal music players will have default settings set at safe exposure limits and the mandate also imposes new requirements for adequate warnings to be given to consumers about the risks involved. The Commissioner acknowledged however that consumers could choose to override the safe default settings if they want to (but at least they will have been warned!). (*EC Press Release Speech/09/414, 28 September 2009*).

Publishing

Controlling Costs in Defamation Proceedings - Responses to Consultation

In February this year, the Ministry of Justice (MoJ) published a consultation paper on proposals to control costs in defamation and possibly some other publication related proceedings where the level of costs might be considered to be too high - the Government said it believed that the litigation costs in publication proceedings were a problem that should be addressed. They were concerned in particular about the effect of the threat of high costs on the ability of the media, and local media in particular, to continue to investigate and publish public interest stories. The MoJ has now published the responses to the proposals in that consultation paper. Of note was the fact that 66% of the respondents were in agreement with the proposal that a maximum recoverable hourly rate should be introduced and 59% were in agreement with the proposal that costs capping should be mandatory in all or most defamation proceedings. Further, 69% agreed with the proposal that there should be a requirement to notify the other party that ATE insurance has been entered into in the letter before claim or at the earliest opportunity and 73% agreed that the courts should apply the proportionality test to total costs not just base costs. The Government announced a pilot scheme in which judges would set budgets for defamation cases, to ensure that the costs were kept proportionate to the seriousness of the case and the reputation damage claimed, however, despite the support for pursuing the proposal for maximum hourly rates, or for cost-capping, whether mandatory or at least as a measure which a court had to consider, it said it was not considering these measures. The MoJ asked the Civil Procedure Rule Committee to consider draft rules to implement a number of measures to control costs in publication proceedings and the paper includes details of the amendments to Rules, Practice Directions and Pre-Action Protocols required to implement the measures, which came into effect from 1 October 2009 - the Civil Procedure Rules Committee said that publication proceedings will also be part of a mandatory costs budgeting pilot, which will be monitored closely as cases progress to ensure that they are "proportionate and within the

agreed budget". The MoJ said that further steps would be taken, if necessary. See <http://www.justice.gov.uk/consultations/docs/costs-defamation-response-ii.pdf> for details.

ASA Adjudicates on Image Rights Without Consent

The Advertising Standards Authority (ASA) has adjudicated on a complaint by a security guard that his photograph (image) was used without his consent in a leaflet promoting his ex-employer's security services. The complainant also alleged that the claims made in the leaflet (pertaining to the licensing of the guards) were misleading. The ASA upheld the complaints and found that there had been a breach of CAP Code clauses 3.1 (substantiation), 7.1 (truthfulness), 13.1a (protection of privacy) and 14.7 (testimonials and endorsements). The security company had not obtained the complainant's written consent to use his image in the leaflet and this was a breach of the Code; further, the company did not provide evidence to establish the licensing and in the absence of substantiation for the claims, the ASA concluded that they were likely to mislead. See http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46996.htm for their ruling. The ASA ruled that the ad must not appear again in its current form.

Technology

ICANN Independent from US Control After Signing of Affirmation of Commitment

With effect from 1 October 2009, the US dominance of the Internet Corporation for Assigned Names and Numbers (ICANN), a not-for-profit private sector corporation established by the US Government to oversee the governance of the Internet, such as the top-level domain (TLD) name system, will come to an end. The US Department of Commerce has signed an Affirmation of Commitments, which will give ICANN much greater autonomy. According to ICANN, the Affirmation commits ICANN to remaining a private not for profit organisation. It declares ICANN to be independent and not controlled by any one entity and it commits ICANN to reviews performed by the community - it says this is a "further recognition that the multi-stakeholder model is robust enough to review itself". See <http://www.icann.org/en/announcements/announcement-30sep09-en.htm> - [announcement](#) for ICANN's announcement, which contains the text of the Affirmation and summarises the reactions of a wide range of interested parties. The European Commissioner for Information Society and Media welcomed the decision and said "Internet users worldwide can now anticipate that ICANN's decisions ... will be more independent and more accountable, taking into account everyone's interests".

Consultations & Reports

Ofcom Report - The Communications Market: Digital Progress Report, Digital TV, Q2 2009 - http://www.ofcom.org.uk/research/tv/reports/dtv/dtu_2009_02/q22009.pdf (Ofcom's 23rd Digital Progress Report covering developments in multichannel television, including quarterly take-up figures derived from consumer research, subscriber figures reported by platform operators and device sales data)