

This is our summary of some of the key legal developments across a range of sectors for the week of 28 June 2010. 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

EPO Updated Guide to Applying for a European Patent

The European Patent Office (EPO) has published an updated edition of its guide to the procedures involved in applying for a European patent. The guide is designed to provide inventors, companies and their representatives with a practical outline of the various stages in the process of applying for a European patent and contains examples of each stage of the process. See [http://documents.epo.org/projects/babylon/eponet.nsf/0/8266ED0366190630C12575E10051F40E/\\$File/guide_for_applicants_part1_05_10_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/8266ED0366190630C12575E10051F40E/$File/guide_for_applicants_part1_05_10_en.pdf) for details.

Commission's Interim Report on EU's Roaming Market

The European Commission has published an interim report on the costs of mobile roaming charges and how they have changed since the introduction of the 2007 EU Mobile Roaming Regulation and its subsequent amendment in 2009. The Commission said that although the cost for roaming calls has decreased by more than 70% since 2005 and sending a text message between EU Member States costs 60% less, consumers still do not enjoy significantly lower tariffs than those which are set by the EU rules. The Commission said although the legislation had led to lower prices, the report showed that, despite the introduction of the price limits, the roaming market was still not competitive enough to provide the best choice and price to consumers - retail prices tended to cluster around the EU regulated maximum price caps. At the end of 2009, the EU legal maximum for roamed voice calls was €0.43 per minute, and consumers who chose the "Euro-tariff" paid on average €0.38 per minute for making a roaming phone call. Euro-tariff consumers also paid on average €0.17 per minute for calls received while roaming, slightly below the legal cap of €0.19. The Commission has said it will produce a full review of the functioning of the Roaming Regulation by 30 June 2011. In that review, the Commission said it will evaluate whether the objectives of the Regulation had been achieved and in doing so, it will review the developments in wholesale and retail charges, the extent of competition in the provision of roaming services and the quality of the services. (*EC Press Release IP/10/851, 29 June 2010; see http://ec.europa.eu/information_society/activities/roaming/docs/interim_report2010.pdf for the Report and see also <http://www.ofcom.org.uk/consumer/2010/07/mobile/> for Ofcom's information note about the reduced charges which apply after 1 July as a result of the regulations*).

PhonepayPlus Introduces Formal Service Standards Policy

PhonepayPlus has announced that it has introduced a formal policy and process to deal with complaints about the organisation and its conduct when dealing with complaints. The Policy sets out briefly details about who can make a complaint and about what and the process for making a complaint and how it will be dealt with. Complaints must be made promptly, and usually within four months of the incident giving rise to the complaint, and the policy provides a non-exhaustive list of the types of conduct that can be complained about. See <http://www.phonepayplus.org.uk/upload/201006-complaints-Policy.pdf> for details.

Broadcasting

Sky Sports 1 & Sky Sports 2 Broadcasting Licences Varied to Give Effect to Wholesale Must Offer Obligation

Ofcom has announced that it has varied the broadcasting licences of Sky Sports 1 and Sky Sports 2 in order to give effect to the changes to the maximum wholesale prices under the wholesale must-offer obligation - the changes have been calculated in accordance with the methodology set out in the Pay TV Statement which was published at the end of March (and see the Need to Know of 29 March 2010 for details). The Statement provided that the maximum wholesale prices Sky could charge pursuant to the wholesale must-offer obligation in the licences for Sky Sports 1 and Sky Sports 2 would track Sky's retail prices over time based on a constant (pounds) margin between retail and wholesale prices. Copies of the licences are available from Ofcom - see <http://www.ofcom.org.uk/tv/ifi/tvlicensing/tvupdates/licensingupdate/licensingupdate/> for details.

ECJ Dismisses Appeal Against Grant of Endowment Capital to France Television

The European Court of Justice (ECJ) has held that the State aid of €150 million which was granted to France Television by the French State is compliant with EU law and compatible with the common market. Metropole Television SA and Television Francaise 1 SA had brought an application before the court, seeking to have the decision of the European Commission to grant France Television with the capital endowment annulled. The court ruled that the State aid granted to France Television by the French State was compliant with EU law and

compatible with the common market because it was intended to cover the costs of the public service broadcasting being undertaken by France Television and accordingly, dismissed the applications. (*Joined Cases T-568/08 and T-573/08 - Metropole Television SA v Commission; Television Francaise 1 SA v Commission - at the time of writing, the judgment of the court is only available in French*).

Corporate

Commission Consults on Revising Market Abuse Directive

The European Commission is consulting on revisions to the Market Abuse Directive 2003/6/EC. The proposals under consideration are aimed at extending the scope of the Directive and introducing rules to enhance the effectiveness of the enforcement powers of the competent authorities and rules to enhance the level of harmonisation and co-ordination between regulators in the EU with the aim of creating a single rulebook. The Commission has argued that the gaps in the regulation of certain instruments and markets as a result of market developments have become more apparent, the effectiveness of enforcement has been uneven and certain provisions impose undue burdens on issuers. See http://ec.europa.eu/internal_market/consultations/docs/2010/mad/consultation_paper.pdf for details. The Commission has said the responses to the consultation will be important in terms of contributing to its proposal, which is currently scheduled for adoption before the end of the year. PLC have also done a useful summary of the key issues being considered in the consultation - see <http://corporate.practicallaw.com/5-502-6484?email=1247376714734&source=updateemail> for details.

OFT Guidance on Company Director Disqualification Orders in Competition Law Cases

The Office of Fair Trading (OFT) has published new guidance setting out its revised approach to seeking director disqualification orders in competition law cases. The guidance explains the powers of the OFT and each specified regulator under the Competition Disqualification Order (CDO) provisions of the Company Directors Disqualification Act 1986, as amended by the Enterprise Act 2002. The OFT has said that it will consider the director's responsibility for the competition law breach (whether by act or omission) in order to assess whether the director is unfit to be concerned in the management of the company. It said it will be just as likely to apply for a disqualification order where it has sufficient evidence that the director directly contributed to the breach, took no steps to prevent the breach, or did not know but ought to have known about the breach. The OFT also said that it had decided that, in exceptional cases, it may be appropriate to apply for a disqualification order where there has been no prior decision or judgement on the infringement, or where no penalty has been imposed on the company. The maximum period of disqualification under a CDO is 15 years and any person involved in the management of a company in contravention of a CDO is personally liable for all of the relevant debts of the company. However, as with all cases, the OFT would still have to satisfy the court that there had been an infringement of competition law. The OFT emphasised however that this approach was not intended to place greater burdens on directors that are responsible for compliance and said that it intends to publish guidelines for directors on their responsibilities under competition law. See http://www.oft.gov.uk/shared_offt/business_leaflets/enterprise_act/oft510.pdf for Guidance.

OFT Report Calls for Reform of Corporate Insolvency Regime

The OFT has also published the results of its recent study on the market for corporate insolvency practitioners. The report found that while the market often works well, it may not work in the best interests of all creditors in over a third of administrations and creditors' voluntary liquidations (CVLs), procedures which together account for 75% of income earned by IPs. Accordingly, the OFT has recommended what it described as "far reaching reforms" to the regulatory system to protect the interests of smaller creditors - in particular it suggested introducing an industry-funded independent complaints handling body with broad powers to review IP fees and actions, impose fines, and return overcharged fees to creditors, the reform of the regulatory system by repositioning the Insolvency Service (IS) as the dedicated oversight regulator of the Recognised Professional Bodies and withdrawing its role as a direct regulator of IPs, providing objectives for the regulatory regime against which its performance can be measured and streamlining the currently inefficient way in which the regulatory regime makes decisions. The OFT noted that it was "important that the market works well, not only for those directly affected by insolvency but for the economy as a whole. Smooth entry and exit of firms is an important feature of a competitive economy and has an impact on productivity" and said "Our recommendations, if enacted, would benefit both the wider economy and good insolvency practitioners, without imposing burdens on the taxpayer". (*OFT Press Release 67/10, 24 June 2010 - see <http://www.oft.gov.uk/news-and-updates/press/2010/67-10> for details, including access to the report*).

Insolvency Service Announces Liquidation of Men's Lifestyle Publishing Magazine

The Insolvency Service has announced Sixty-Sixty Four Limited, a London based company that traded as "Upstreet" and was involved in publishing men's lifestyle magazines, has been ordered into liquidation in the High Court on the grounds of public interest. An investigation by the Insolvency Service found that the company was operated with a lack of commercial probity, was insolvent, provided misleading information to potential advertisers, funders and subscribers, failed to maintain proper accounting records and had failed to pay at least eight employees and freelance journalists. See

<http://nds.coi.gov.uk/content/detail.aspx?NewsAreald=2&ReleaseID=414096&SubjectId=2> for details.

Application to Continue Derivative Action Under Section 261 - Grounds to Grant Permission

The applicant applied under section 261 of the Companies Act 2006 for permission to continue a derivative claim seeking relief on behalf of the relevant company against the respondents, being the company's two directors and another company of which one of the directors was the sole shareholder and director. The action resulted from certain loans being made to the company in which the applicant had a very small shareholding and which the applicant said resulted in the two directors breaching their duty to the company due to the basis on which the loans were made, and the fact that the loans had been made at all. Under section 261, a member of a company who brings a derivative claim must apply for leave to continue it, and on that application if the evidence does not disclose a prima facie case, the court must dismiss it. The Act provided for a two-stage procedure where a member wished to bring a derivative claim. The applicant was first required to make a prima facie case for permission to continue a derivative claim. Then the court had to find that the cause of action arose from an act or omission involving negligence, default, breach of duty or breach of trust by a director. At that second stage it was not simply a matter of establishing a prima facie case. It was wrong to embark upon a mini trial of an action. The court said that the test to be applied was that set out in *Lesini v Westrip Holdings Ltd* (2009) EWHC 2526 (Ch) - the necessary evaluation was not mechanistic and a range of factors would have to be considered to reach an overall view. On the facts, the failure to obtain interest over a period of almost nine years on lending to the other company that rose from £4.6 million to £8.1 million constituted very strong grounds for a claim that the directors were in breach of their fiduciary duties. It had been asserted that the outstanding interest had been repaid, but it was not clear whether that was so. It would therefore be appropriate to grant the applicant permission to continue the derivative claim until the conclusion of disclosure. There was at least a well arguable case that the additional lending to the other company was made in breach of the directors' relevant duties. Accordingly, the court granted the application. (*Stainer v Lee & Ors* [EWHC] 1539 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/1539.html> for the judgment).

Litigation

Court of Appeal Rule on Trial by Jury in Libel Case - Whether Judge Erred in Ordering Trial by Judge Alone

The appellant appealed against a decision that the trial of his libel action, which arose as a result of a television programme that the appellant said was entirely libellous, should be heard by a judge alone. The parties had initially agreed that the action should be tried with a jury however the defendants applied for an order that the trial be by judge alone shortly before the start of the trial. The decision as to mode of trial was governed by section 69 of the Senior Courts Act 1981 which provided for jury trial unless the court was of opinion that the trial required any prolonged examination of documents which could not conveniently be made with a jury and in such a case conferred a discretion on the court nevertheless to order a jury trial. The issues in the case went to the meaning of the words and pictures used in the programme, justification and fair comment, malice and republication. The judge decided that there would be a sufficient number of documents, including film footage on video, which would require sufficiently detailed examination at trial to satisfy the first section 69 question, and that in the light of the need for prolonged examination of the footage and documents, it would be substantially more difficult and less convenient to try the case with a jury even though there were no special difficulties or complexities in the footage or documents themselves. The appellant submitted that the judge exaggerated the extent to which the documents he identified would involve prolonged or difficult examination and the extent to which the absence of a jury would enable time to be saved. The Court of Appeal noted that the applicable principles had been summarised in the authorities (*Aitken v Preston* [1997] EMLR 415), and ruled that the judge had not erred in deciding that trial should be heard by a judge alone. Extra time and cost should not be given too much weight and the number of documents involved was not the issue. The fact that one party was a public figure might be a reason for favouring a jury trial, but that did not mean that the fact that neither party was a public figure was a reason against a jury trial. The constitutional importance of the right to trial by jury was clearly in the judge's mind - the Court of Appeal said "this was a full, careful and considered judgment of a judge, with very wide experience of defamation cases, and with detailed knowledge of the case and of the issues involved, who, after summarising the facts and issues in the case and directing himself correctly as to the applicable legal principles, considered the three section 69 questions by reference to a careful assessment of the way in which the

trial was likely to proceed, and, while accepting that the ultimate decision was not easy, concluded that the trial should not proceed with a jury". (*Fiddes v Channel Four Television Corporation & Ors* [2010] EWCA Civ 730 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2010/730.html> for the judgment).

Court of Appeal Upholds Convictions under Video Recordings Act 1984

The Court of Appeal has upheld convictions made under the Video Recordings Act 1984 in two cases heard together which saw two chancers try their luck and seek have their convictions quashed. The appeals were brought after the UK Government acknowledged that it had failed, in 1984, to notify the European Commission of the existence of the Act under the Technical Standards and Regulations Directive (83/189/EEC), and that as a result, the Act was unenforceable. The Video Recordings Act 2010 was passed as a matter of urgency to correct the situation. The Court of Appeal concluded that the convictions remained safe and it noted that there were no grounds to set the convictions aside under UK law as they had not given rise to any substantial injustice. (*R v Nikolas Budimir and Nicholas Rainbird* [2010] EWCA Crim 1486; *Interfact Ltd v Liverpool City Council* [2010] EWHC 1604 (Admin) - see <http://www.bailii.org/ew/cases/EWCA/Crim/2010/1486.html> for the judgment).

Publishing

Libel Proceedings Following Newspaper Article - Whether Words Capable of Bearing Alleged Meanings

The claimant, a well-known fund managing "superwoman", commenced libel proceedings against the defendant publisher in relation to article published in a national newspaper about her failing business venture. The defendant put forward a defence of fair comment and applied for ruling on the meaning of the words and on a defence of fair comment. At issue for the court was whether the disputed words were a statement of fact or were fair comment. The court noted in determining meaning in a defamation case, the judge ought to give the relevant article the natural and ordinary meanings which it would have conveyed to ordinary reasonable readers reading the article once (that was to say, reasonable readers of the journal in question). Such a hypothetical reasonable reader should not be treated as either naive or unduly suspicious, but recognised as capable of reading between the lines and should not be treated as being "avid for scandal". The court ruled that article bore the meanings that the claimant had looked likely to be toppled from her pedestal as a celebrated fund manager amid a massive shareholder uprising and acrimonious allegations as a result of dissatisfaction with her performance as a fund manager and that she had been called "disingenuous" by a disgruntled former colleague in her approach towards a Middle East investor, amongst other things. In the circumstances, the article had not conveyed the allegations complained of and the comments in question were expressions of opinion or comment. An ordinary reasonable reader would recognise them as comments. Further, any such expressions of opinion had related to matters of public interest, as opposed to purely private matters "not least because when [the fund] was launched members of the public were invited to invest. But, more generally, the fate of the fund and its investors is clearly a matter of public interest". (*Horlick v Associated Newspapers Ltd* [2010] EWHC 1544 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/1544.html> for the judgment).

Allegations in Series of Articles - Whether Words Capable of Bearing Defamatory Meanings Alleged

The claimant commenced libel proceedings against defendants following the publication of certain articles in the local newspaper which related to the misuse of funds that had been raised for childrens' cancer treatment. The defendant applied for a ruling pursuant to Practice Direction 4 of CPR 53 PD4 that the words complained of were incapable of bearing the defamatory meanings alleged by the claimant. At issue for the court was whether the words complained of were capable of bearing defamatory meaning alleged. The court said it was "important to remember that when the court is assessing whether or not words are capable of bearing any particular meaning(s), they should be read in their context" - the defendants, pointed out that there were contained within the articles allegations about the claimant and about the fund that the court said were "undoubtedly defamatory" and reference was made to the claimant having a "criminal past" (in the first article) and to an ongoing investigation into the Fund by the Gambling Commission and to its being "at the centre of a criminal investigation" (the fourth article). However, the court noted the claimant did not make any complaint about these specific allegations. The court ruled that in relation to the first and second articles, "the words complained of, taken as a whole, cannot be taken as defamatory of Mr Wright in the sense of which he complains" however, in relation to the third and fourth articles the court ruled that they were capable of bearing defamatory meanings of the claimant and should not, therefore, be struck out. (*Wright v Gregson & Ors* [2010] EWHC 1629 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/1629.html> for the judgment).

Sport

New Legislation - Safety of Sports Grounds (Designation) Order

The Safety of Sports Grounds (Designation) (No 2) Order 2010, SI 2010/1664 comes into force on 19 July 2010. The Order designates the Globe Arena, occupied by Morecambe Football Club Limited, and the b2net Stadium, occupied by CFC 2001 Ltd (trading as Chesterfield Football Club), as sports grounds requiring a safety certificate under the Safety of Sports Grounds Act 1975. Safety certificates contain such terms and conditions as the local authority may consider to be necessary or expedient in order to secure reasonable safety at the sports ground and take into account the seating capacity of the grounds in question. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20101664_en.pdf for details.

Technology

Article 29 Working Party Adopts Opinion on Online Behavioural Advertising

The Article 29 Data Protection Working Party has adopted its second Opinion on online behavioural advertising - the Working Party starts by acknowledging that practice of behavioural advertising raises important data protection and privacy related concerns and states that the Opinion is intended to "clarify the legal framework applicable to those engaged in behavioural advertising". The Working Party said they were "deeply concerned" about the privacy and data protection implications of the increasingly widespread practice of targeting online behavioural advertising: "Whilst data protection legislation requires, among other things, obtaining informed consent from individuals to engage in this practice, in reality it is very doubtful whether average individuals are aware of, much less that they consent to, being monitored to receive tailored advertising". The Opinion suggests, amongst other things, that advertising network providers are bound by the obligations of Article 5(3) of the E-Privacy Directive insofar as they place cookies and/or retrieve information from cookies already stored in the data subjects' terminal equipment. The Opinion invites the industry to "suggest technical and other means to comply with the framework" described in the Opinion as soon as possible and to undertake a dialogue with the Article 29 Working Party regarding such means. However, the Article 29 Working Party has said that it will evaluate the situation and take any measures necessary and appropriate to ensure compliance with the framework described in the Opinion. See http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2010/wp171_en.pdf for details.

ICANN Allow .xxx Domain Name Application

The Need to Know of 5 & 12 April 2010 discussed ICANN's consultation on options for dealing with the application to register a .xxx domain name. ICANN has now voted to allow the application for the .xxx top-level domain name to move forward. This follows its recent consultation on the options for this domain name and whether it should accept the majority finding of the independent review panel that the board had been wrong to reject ICM Registry's application in 2007. The ICM registry had applied for the .xxx sponsored top-level domain as a potential community site for the adult entertainment industry. The ICANN Board approved a detailed set of next steps for the application, including expedited due diligence, negotiations on a draft registry agreement, and consultation with ICANN's Governmental Advisory Committee. (*ICANN Press Release, 25 June 2010*).

Consultations & Reports

European Commission Consultation - Public Consultation on the Open Internet and Net Neutrality - http://ec.europa.eu/information_society/policy/ecomms/doc/library/public_consult/net_neutrality/nn_questionnaire.pdf (the Commission's consultation invites comments on proposals to deal with issues on net neutrality such as whether internet providers should be allowed to adopt certain traffic management practices, prioritising one kind of internet traffic over another; whether such traffic management practices may create problems and have unfair effects for users; the level of competition between different internet service providers and the whether the transparency requirements of the new telecom framework may be sufficient to avoid potential problems by allowing consumers' choice; and whether the EU needs to act further to ensure fairness in the internet market, or whether industry should take the lead, amongst other things. The consultation will be used in preparing the Commission's report on net neutrality, which is due to be presented later in the year).

European Commission Directorate General Internal Services Consultation - Mutual Evaluation Foreseen by the Services Directive - Stakeholders' Consultation - http://ec.europa.eu/internal_market/consultations/docs/2010/services_directive/consultation_paper_en.pdf (the Commission's consultation is inviting views on the "mutual evaluation process" of the transposition of the Services Directive into the law of Member States. The deadline for implementation of the Directive was December 2009 and

since January 2010, Member States have been evaluating certain aspects of their national legal frameworks applicable to service providers. The Commission is now inviting views on this process - the Directive applies to a wide range of services, including professional services, distribution services, craft services and information services such as web portals, publishing, computer programming activities).

Ofcom Consultations - Broadcasting Code Review: Commercial References in Television Programming - Proposals on Revising the Broadcasting Code and Broadcasting Code Review: Commercial Communications in Radio Programming - Proposals on Revising the Broadcasting Code - <http://www.ofcom.org.uk/consult/condocs/bcrtv2010/tvcondoc.pdf> (television) and <http://www.ofcom.org.uk/consult/condocs/bcrradio2010/radicondoc.pdf> (radio) (Ofcom is consulting on proposed new rules to allow product placement on TV and proposals to liberalise the rules on paid-for references to brands and products in radio programmes. According to Ofcom, both proposals are "designed to enable commercial broadcasters to access new revenue streams where possible, whilst protecting audiences" - revised rules are expected to be issued at the end of the year).

Ofcom Consultation - Radio Multiplex Licence Renewals - <http://www.ofcom.org.uk/consult/condocs/radiomux/radiomuxcondoc.pdf> (Ofcom's consultation sets out proposals relating to the renewal of radio multiplex licences, including the timetable within which the holder of a radio multiplex licence is able to apply for renewal and the circumstances in which a renewal can be granted).

Ofcom Annual Report 2009/10 - The Office of Communications Annual Report and Accounts for the period 1 April 2009 to 31 March 2010 - http://www.ofcom.org.uk/about/accoun/reports_plans/annrep0910/annrep0910.pdf.