

This is our summary of some of the key legal developments across a range of sectors for the week of 5 July 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

Commission Welcomes Ruling Confirming Abuse of Patent System Constitutes Abuse of Dominant Position

The European Commission has welcomed the judgment of the General Court of the European Court of Justice in Case T-321/05 which largely dismissed the appeal by the pharmaceutical companies AstraZeneca AB and AstraZeneca Plc. The ruling concerned the Commission's June 2005 decision, which imposed a fine of €60 million on AstraZeneca for misusing the patent system and the procedures for marketing pharmaceutical products so as to prevent or delay the market entry of competing generic medicinal products - the Commission said the ruling was "significant" because it upheld the Commission's first decision on abuse of dominance in the pharmaceutical markets but also made it clear that the misuse of regulatory procedures, including the patent system, may constitute an infringement of EU competition rules. The Court confirmed that AstraZeneca's conduct amounted to "a consistent and linear course of conduct, characterised by the communication to the patent offices of misleading representations for the purpose of obtaining the issue of SPCs (Supplementary Protection Certificates) to which it was not entitled or to which it was entitled for a shorter period". As a consequence of its conduct, AstraZeneca obtained additional so-called SPC protection in several countries, which constituted a principal entry barrier for generic versions of an original medicine. (*EC Press Release Memo/10/294, 1 July 2010 - see [here](#) for the judgment*).

The Commission's Competition Policy and Digital Media and the Internet - Current and Future Policy

The Vice President of the European Commission responsible for competition policy has given a speech on the role of competition for digital media. He noted "Sound and careful regulatory policy must support and complement competition policy in creating the appropriate environment for the digital economy". On the role of collecting societies he said they serve a vital role but the way they manage licensing agreements needs to change and noted that the "fragmented national monopoly model and the de facto allocation of customers can no longer stand in their current form". Accordingly, the Commission will continue to closely monitor the practices and behaviours such as long term membership agreements and exclusive assignments of rights by the authors and will push forward proposals to improve the transparency and governance of collecting societies and to facilitate pan-European licensing of content. He warned that "state intervention might be needed to achieve public interest objectives such as universal access to basic services, scientific and artistic creation, regional cohesion or privacy and safety protection". (*EC Press Release Speech/10/365, 7 July 2010*).

OFT Invites Comments from Businesses on Barriers to Online Trading

The Office of Fair Trading (OFT) is inviting comments from small and medium businesses about the various issues they face when engaging in online business. The OFT said small businesses are increasingly relying on services such as search engines, online market places and payment service providers as essential gateways to trading over the Internet but that some firms had complained that certain practices of larger players were creating barriers to their entry or expansion. The OFT has already commissioned independent research on these issues - the findings provided the OFT with a basic assessment of the scale and nature of barriers faced by small or medium-sized businesses. The OFT said the overall findings were positive about online markets however they recognised that the market was incredibly diverse and that experiences would vary enormously. At this stage however the OFT said that they did not envisage that there would be any immediate need for intervention. See <http://www.of.gov.uk/news-and-updates/press/2010/78-10> for details, including a link to the research report.

OFT Refers Getty Images Acquisition of Rex Features to Competition Commission

The OFT has referred the anticipated acquisition by Getty Images, Inc of Rex Features Limited to the Competition Commission for further investigation. Getty and Rex are two of the largest suppliers of photographic images for editorial use by publications in the UK. Getty has significant strength in the supply of both archive and current entertainment-related editorial images. The OFT said it was concerned that, if the merger were to proceed, the loss of Rex as an independent competitor could enable Getty to increase prices for customers. During its investigation, the OFT said it had been made aware of the concerns from third parties, which supported the view that the profiles and extensive image archives of Getty and Rex meant they are close competitors. The Competition Commission is expected to report by 23 December 2010. (*OFT Press Release, 8 July 2010*).

MoJ Calls for Evidence on UK's Data Protection Legislative Framework

The Ministry of Justice is (MoJ) calling for evidence on the UK's current data protection legislative framework comprising the Data Protection Directive 95/46/EC and the Data Protection Act 1998 - the MoJ is inviting comment on how the framework is working and its impact on individuals and organisations. According to the MoJ, the responses will "help inform the UK's position on negotiations for a new EU data protection instrument, which are expected to start in early 2011". See <http://www.justice.gov.uk/dpa-call-evidence-02-07-2010.pdf> for details.

UNCITRAL Adopt Supplement on Using IP to Secure Credit

UNCITRAL (the United Nations Commission on International Trade Law) has adopted the UNCITRAL Legislative Guide on Secured Transactions, Supplement on Security Rights in Intellectual Property as a supplement to its guide on secured transactions dealing with intellectual property (IP). The aim of the guide is to assist States in the development of modern secured-transactions laws to promote the availability of low-cost secured credit. The IP supplement is designed to allow IP rights-owners to use IP as security for credit, to use the full value of their assets to obtain credit, and to enable them to create a security right in IP rights. (*UNCITRAL Press Release UNIS/L/140, 1 July 2010*).

Article - The Importance of Trademark Coexistence Agreements

The latest issue of the New Law Journal contains an article highlighting the importance of clearly drafted trademark coexistence agreements. The article considers the recent High Court case, *Omega Engineering Incorporated v Omega SA* [2010] EWHC 1211 (Ch) (and see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/1211.html> for the judgment), which "confirmed that English courts will enforce trade mark coexistence agreements and allow trade marks to be registered which might impinge upon earlier rights where consent to the registration has been given". (*"Handle with Care" (2010) 160 NLJ 934 - the article is available from LexisNexis*).

Article - The Mechanics for Taxing Entertainers and Sportsmen

The latest issue of Taxation contains an interesting and practical article, which explains briefly the tax rules that apply to entertainers and sportsmen visiting the UK. The article sets out details about the applicable legislation, guidelines and definitions and the mechanics of the collection of tax and the circumstances when a reduced level of tax may be withheld. (*"Les Visiteurs" (2010) Taxation, Volume 166, 17 - the article is available from LexisNexis*).

Broadcasting

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published, with details of adjudications on breaches of Rules 1.3 (children must be protected from unsuitable material by appropriate scheduling) and 2.3 (offensive material must be justified by the context) of the Broadcasting Code. Ofcom also reminded broadcasters that despite its consultation on product placement (and see last week's Need to Know for details), the current version of the Code still applies in respect of restrictions on product placement. See <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb161/issue161.pdf> for details.

BBC Trust's Interim Report on BBC Strategy Review - Immediate Priorities Identified

The BBC Trust has published their interim conclusions on the BBC Strategy Review - the Trust undertook the review "to consider how we can get the very best out of the BBC for licence fee payers". The initial conclusions focussed on "what audiences tell us matters most to them: BBC programmes and services and the way the BBC spends their money". The Trust said that they agreed with the principles set out by the BBC Executive to "put quality first" and

“do fewer things better” and also agreed with the Director-General that the “BBC can and should go further in concentrating a greater proportion of its funds on content and creativity”. In the face of this approach however the Trust noted that there remained serious issues on how to re-structure the portfolio of BBC services to deal with the prospect of further progress towards a fully digital, on-demand world and there were also immediate challenges in terms of showing value for money and a distinctiveness of content. The Trust noted that, “A new approach to value for money is fundamental to public trust in the BBC”. The immediate implications for existing television services are having the immediate focus should be on increasing the distinctiveness of existing services, with a particular focus on greater variety and ambition on BBC One in peak time, and making BBC Two stand out as a clearer alternative through greater depth and ambition in its factual programming, comedy and drama. For radio services the immediate priorities are delivering greater distinctiveness on Radio 1 and Radio 2; and to put together a full strategy for the BBC’s contribution to future digital development, based on Government policy, detailed discussion with the commercial radio industry and an appraisal of the potential of DAB against alternatives, including Internet Protocol radio. See http://www.bbc.co.uk/bbctrust/assets/files/pdf/review_report_research/strategic_review/interim_conclusions.pdf for the report.

Article - Implications of the BskyB Ruling and Media Plurality

The latest European Competition Law Review contains an interesting article which considers the implications of the ruling in *British Sky Broadcasting Group plc v Competition Commission* [2010] EWCA Civ 2. The article makes the point that the case is significant in a number of key respects, “not least in relation to the scope of judicial review in UK merger cases and the approach to the assessment of media plurality”. The case was the first time that the Secretary of State used his powers to intervene on media public interest grounds in a relevant merger situation (RMS) under the Enterprise Act 2002. (“*The Court of Appeal judgment in British Sky Broadcasting Group Plc v Competition Commission and the limits of media-plurality regulation*” (2010) ECLR, Issue 31(8) - the article is available via Westlaw).

Film & TV

Commission Report Highlights Risks to Europe’s Film Heritage

The European Commission’s Information Society and Media Directorate General has published a report in which it discusses its concerns about the long term survival of Europe’s film heritage by analysing the current situation and identifying the challenges it faces in the digital era. The report makes the point that that Europe’s film heritage institutions should take a “new approach to the way they safeguard and provide access to Europe’s film heritage”. The report says that the traditional model - conserving fragile film materials in sealed boxes in vaults - cannot guarantee their preservation for posterity or accessibility and suggests that in the digital age, a new access model is needed so that future film makers and audiences can continue to enjoy European film culture. According to the report, some 80% of all silent films have already been lost. The report also compares Member States’ best practices for dealing with the challenges of analogue and digital film heritage - certain national and regional funding schemes for film production include a clause requesting the beneficiary producer to grant rights for non-commercial uses for the EU to the funding authority or to a public film heritage institution. Spain and Denmark are mentioned as providing examples of good working practices. (EC Press Release, IP/10/894, 6 July 2010 - see http://ec.europa.eu/avpolicy/docs/reg/cinema/report_2/2010_853.pdf for the report, which contains details of the various initiatives being implemented in the EU).

Litigation

Appropriate Jurisdiction for Determining Ownership of Ukrainian Football Club - Forum Non Conveniens

The appellant company appealed a decision to stay proceedings it had brought against the respondents in the English courts on the basis that Ukraine was the proper place for the trial of its claim. The appellant’s claim was based on the respondents’ alleged actions in taking steps that intentionally diluted the appellant’s stake in a Ukrainian football club. The appellant sought damages under the Civil Code of Ukraine for alleged tortious conspiracy to injure and restitutionary remedies for unjust enrichment. The principal parties and the claim had no connection with the English courts however, the appellant argued that a fair trial of the claims in the courts of Ukraine was impossible. The only connection with the English jurisdiction was that an English registered company, which was controlled by the main defendant, had been joined as a defendant. The court noted where a defendant had been served with proceedings in the jurisdiction, the burden of proving that there was a forum outside England that was appropriate rested on the defendant. In a case involving service out of the jurisdiction the issue for the court was whether England was the appropriate forum, and if it was, permission to serve out of the jurisdiction would be granted unless there were circumstances by reason of which justice required that service out of the jurisdiction should nevertheless be refused. In those circumstances, the burden of proving that England was the appropriate forum rested on the claimant. The court said the dispute had absolutely no connection at all with England and Ukraine was not only the more appropriate forum for the trial, it was the only other appropriate forum

for it: no other jurisdiction had been suggested. Further, the appellant's claim in conspiracy, and to a lesser extent its unjust enrichment claim, gave rise to acutely difficult issues of Ukrainian law on which it would not be appropriate for the English courts to pronounce. (*Pacific International Sports Clubs Ltd v Igor Surkis & Ors* [2010] EWCA Civ 753 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2010/753.html> for the judgment).

High Court Dismisses Action for Unlawful Threats of Trade Mark Infringement Proceedings

The High Court has dismissed an action for unlawful threats of trade mark infringement proceedings under section 21 of the Trade Marks Act 1994 on the ground that, viewed as a whole, and in the context of what had preceded it, the solicitor's letter which was alleged to contain the threat being complained about was a comprehensive negotiating response to the claimant's proposal, which attracted the protection of privilege. The claimants had planned to open a series of consumer electronics shops in the UK and in other EU countries under the Best Buy name, a name which the first claimant had used extensively in the US. The defendant, a Spanish corporation, owned a number of figurative CTMs and national registered trade marks, including the words Best Buy - the lawyers for the defendant wrote to the claimant regarding their proposals to open the shops, which contained details about the defendant's trade marks and outlining proposals to potentially agree a co-existence agreement. This was followed up with a second letter on the matter however the claimants started proceedings without notice. The court dismissed the action, ruling that viewed as a whole, the letter was a comprehensive negotiating response, which attracted the protection of privilege. (*Best Buy Co Inc & Anor v Worldwide Sales Corp España SL* [2010] EWHC 1666 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/1666.html> for the judgment).

Report on Outcome of Defamation Trials, Summary Determinations and Assessments - January - June 2010

A report analysing the figures for the first half of 2010 for defamation actions has shown that claimants have generally been struggling to succeed with their claims. The figures were drawn from all the substantive defamation hearings before High Court Judges, including trials, offer of amends assessments, summary disposals and determinative preliminary issues between January and June 2010. According to the report, "Ten libel cases have concluded in court this year, with the claimant recovering damages or compensation in only two (20%). Of these ten cases, four involved the mainstream media, which was completely successful in three and in the fourth (Bowman) was, for all practical purposes, the winner - the claimant having failed to match an earlier offer and, as a result, being liable for the costs of the hearing". See <http://inform.wordpress.com/2010/07/02/defamation-trials-summary-determinations-and-assessments-jan-to-june-2010/#more-3059> for access to the figures.

Music

Australian Federal Court Rules on Damages for Use of Flute Riff in Hit Song

The New South Wales' Federal Court has issued its ruling in the claim brought against the band "Men at Work" in respect of their hit "Down Under" by Larrikin Music - Larrikin had successfully argued that a flute riff in the song had been taken from their popular song about a kookaburra sitting in an old gum tree. Larrikin owned the rights to the Kookaburra song, which was written in the 1930s for girl guides to sing, and had been seeking up to 60% of Down Under's profits as damages. Although the court had decided that an element of the Kookaburra song had been used by the band, it found the claim for damages by Larrikin was "excessive, over-reaching and unrealistic". The court said, "Although the quotation from Kookaburra in the 1981 recording is ... sufficient to constitute an infringement of copyright, other factors are to be taken into account in assessing the percentage interest payable in a hypothetical licensing bargain". The disputed riff made up only 5.8% or two bars of the song. Justice Jacobsen ordered Men At Work frontman, fellow songwriter and EMI to pay Larrikin 5% of future profits, as well as royalties dating back to 2002. EMI has said that the broader ruling on copyright breach might be appealed. (*Larrikin Music Publishing v EMI Songs Australia Pty Limited (No 2)* [2010] FCA 698 - see <http://www.austlii.edu.au/au/cases/cth/FCA/2010/698.html> for the Federal Court judgment).

Private Member's Bill for Live Music - First Reading Before House of Lords

The Private Members Bill, the Live Music Bill, which is proposing amendments to the Licensing Act 2003 in order to support the live music industry in the UK has had its First Reading in the House of Lords - the Bill was read a first time and ordered to be printed. The date for the Second Reading is yet to be announced and at the time of writing, the printed Bill was not available. (*House of Lords' Hansard, 7 July 2010, Column 203*).

Statement in Open Court - False Allegations in Statement on Employer's Website

The claimant, an employee of the defendant, brought a libel action against her employer following the defendant's posting of a statement about her involvement in the "Baby P" case on its website. The statement alleged that the claimant had not raised any concerns about the safety of Baby P, which was not the case. The defendant accepted that the statement on the website was false and that the claimant had not in any way been implicated in the death of the child - it apologised to the claimant, undertook not to repeat the allegations and pay damages. Leave to withdraw the record was requested. (*Henry v The London Borough of Haringey, Unreported, QBD, 1 July 2010*).

Independent Governance Review of PCC - Report Published

In August 2009 the Chairman of the Press Complaints Commission (PCC) announced that a review of the governance of the Commission would be undertaken, so as "to make recommendations in order further to build public confidence in the administration of independent press regulation in the UK". The results of that review have now been published. The report noted "There is no question ... that suspicion lingers over the notion of self-regulation as a philosophy, with its implied corollary of industry self-interest and control" and made the point that "Accusations of self-interest, whether well-founded or not, are important, as they can affect public confidence. The Commission must strongly grip the need for this self-regulatory system constantly to exert itself to demonstrate good evidence of its robustness and independence of judgment". The report focussed on five key areas - clarity of purpose, effectiveness, independence, transparency and accountability and made recommendations in all areas. It suggested amongst other things, that the Commission should take responsibility for setting out what its role entails and make clear the areas of activity against which it should be judged, that PCC should agree a list of performance objectives every year and publicly report on whether they were achieved, and, if not, why not, that statistics should be consistently presented to enable year-on-year comparison, that the Commission should institute a regular programme of polling public opinion on issues relating both to the PCC itself and press standards more generally, that the Commission should ensure that it discusses issues of major public concern, with a view to considering what action it might wish to take, that Commission should use complaints trends, or issues raised by working groups, to consider expanding its range of guidance to the industry on the application of the Code and that the PCC must do more to demonstrate the effectiveness of its current sanctions, and ensure that they are properly exercised and understood. See http://www.pcc.org.uk/assets/441/Independent_Governance_Review_Report.pdf for the report.

Defamation Bill - Progress Through Parliament

The Second Reading of the Private Member's Defamation Bill took place on 9 July 2010 in the House of Lords. In introducing the Bill for the second time, Lord Lester of Herne Hill said, "The unsatisfactory state of English defamation law is notorious and well recognised both here and abroad. It suffers from the twin vices of legal uncertainty and over-breadth. It has failed to adapt to the changed world of communication by means of the Internet and worldwide web. The litigation it engenders is costly and often protracted, and it has a severe chilling effect on the freedom of expression not only of powerful newspapers and broadcasters, but of regional newspapers, NGOs and individual public critics. That chilling effect, well recognised by our most senior courts, encourages self-censorship and impairs the communication of public information about matters of legitimate public interest and concern". He said the Bill "provides a framework of principles and rules within which courts interpret and apply the law on a case-by-case basis. It builds on what is best in current law, and brings that law up to date with the effects of electronic communication via the Internet". It does not cover media intrusions on personal privacy, data protection and breach of confidence, which Lord Lester said were "beyond its scope" and it does not deal with the regulation of costs in defamation proceedings. Lord Lester noted that statutory powers existed to deal with costs and said he trusted that the legislation to deal with costs "would soon be exercised to tackle the abuse of conditional fee agreements and success fees". However, in a move which surprised some, the Government promised reform of the libel laws to provide a "fair balance" between freedom of expression and protection of reputation. The Justice Minister said there would be a wide-ranging consultation exercise over the summer with publication of a draft Bill early in the new year.

Technology

ICO Launches Personal Information Online Code of Practice

The Information Commissioner's Office (ICO) has launched an online code of practice which is intended to assist organisations improve their online privacy and data protection principles by providing them with a best practice guide. The guide deals with issues such as good practice in relation to the collection and use of personal data online, including discussion of online behavioural advertising; the approach that should be taken to collecting information from children online; the information that should be provided regarding privacy options on web browsers and websites; and what the default privacy settings should be. See <http://www.ico.gov.uk/ebook/ebook.htm> for the guide.

Government Launches Digital Radio Action Plan

The Government has published its Digital Radio Action Plan, which addresses the issues that need to be resolved before switchover to digital radio can take place and has announced that, although it is not setting a date for switchover at present, it supports the industry target of 2015. The Government confirmed that any digital radio switchover should only begin when the market is ready and that a decision on switchover can only be made once 50% of all listening is to digital and national DAB coverage is comparable to FM, and local DAB reaches 90% of the population and all major roads. The Government said it believes that certainty, for the sector and consumers, is the key to unlocking the potential and building confidence in a digital future for radio and reiterated their belief that the transition to digital radio must be "consumer led". See http://www.culture.gov.uk/images/publications/digitalradioactionplan_vs1.pdf for details. The Government also said that the Action Plan will be subject to quarterly review and will during the duration of the programme be amended to capture new issues and refine the delivery timetable.

Competition Commission "Watching" Internet Search Market

The European Union's Competition Commissioner has announced that the Competition Commission is currently examining some allegations of anti-competitive conduct in relation to Internet search services currently being offered. The Commissioner said the work is at an early stage, but given the importance of search to a competitive online marketplace, they were looking at the allegations "very carefully". The Commissioner did not mention any search providers by name but noted that the Commission was carefully considering the market and warned "If companies do establish themselves in a strong position on a market, there may be risks that they will use this position to foreclose other markets". According to the Commissioner, "the most important search engine in Europe benefits from a 95% market share".

Consultations & Reports

Ofcom Consultation - Renewal of the Independent National Radio Licences - Methodology for Review of Financial Terms - http://stakeholders.ofcom.org.uk/binaries/consultations/renewal-national-licences/summary/INR_renewals.pdf (Ofcom's consultation invites views on the methodology for determining the payments to be made by the holders of the national analogue radio licences, as part of the process of renewing the licences for up to a further seven years).

Ofcom Consultation - Radio Multiplex Licence Renewals - <http://stakeholders.ofcom.org.uk/binaries/consultations/radiomux/summary/radiomuxcondoc.pdf> (Ofcom is consulting on proposals to renew all of its 47 Broadcasting Act 1986 radio multiplex licences - the Broadcasting Act 1996 sets out the statutory framework for 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 Consultation - Recognised Spectrum Access ("RSA") for Receive Only Earth Stations in the Bands 1690 - 1710 MHz, 3600 - 4200 MHz and 7750 - 7850 MHz - <http://stakeholders.ofcom.org.uk/binaries/consultations/746367/summary/rsacondoc.pdf> (Ofcom's consultations sets out details of its proposals to introduce recognised spectrum access (RSA) for receive-only earth stations in the bands 3600 - 4200 MHz for the Fixed Satellite Service (FSS) and the bands 1690 - 1710 MHz and 7750 - 7850 MHz for the Meteorological Satellite Service (MetSat). This is in response to representations from receive-only earth station operators in these bands and comments made in the regulatory report of the UK Space Innovation and Growth Team and will affect only the specified bands).