

This is our summary of some of the key legal developments across a range of sectors for the week of 19 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](#).

Speed Read

General

Government Announces DCMS' Priorities and Milestones

Licensing Act Responsibility Transferred to Home Secretary and Other Quango Closures

DMA Updates Code of Practice on Direct Marketing

Commission's 2009 Annual Report on EU Customs Action to Enforce IP Rights

Article 29 Working Party FAQs on Model Clauses for Transferring Personal Data

Claim for Commission Owed Under Image Rights Representation Agreement - Whether Agreement Enforceable

Broadcasting

Competition Commission Invites Comments on Notice to Vary CRR Undertakings

DCMS Announces No Change to Current Free-to-Air List until After Digital Switchover

Government Asks CCPR to Review Voluntary Code for Sports Broadcasting

Broadcast Bulletin - Latest Issue

Commission Authorises Participation in Italian DTT Tendering Process

Commission Approves Spain's Tax Measures to Support Public Broadcaster

Commission Approves Annual Funding for France Télévisions

Gambling & Betting

Government to Investigate Using Abandoned Betting Accounts and Unclaimed Winnings

World Cup Declared Clean (At Least From a Betting Point of View)

Litigation

Article - ADR and Libel Claims

Publishing

Statement in Open Court - Advertisement Falsely Implying Claimant's Responsibility and Allegations of Lying

Competition Commission Cancels Getty/Rex Features Reference

Government Announces DCMS' Priorities and Milestones

The Government has announced the departmental priorities for the DCMS which will be included as part of its structural reform - these include the reform of the media regulatory regime for the digital age to "reduce regulation, encourage investment and create the conditions for sustainable growth" by reforming Ofcom and deregulating the broadcast sector and the delivery of universal broadband at speeds of 2mbps and stimulate private sector investment to deliver the best superfast broadband network in Europe by 2015. In making the announcement, the Government also said that the scoping exercise for the recently announced Communications Bill would be completed by November 2011. The reform of the BBC was also discussed - the DCMS will be working towards having a new BBC licence fee settlement agreement, which will maintain the BBC's independence, in place by April 2012. In relation to the broadband policies, the announcement said that the Government would have complete a consultation on infrastructure deregulation by November 2010, publish a report on the impact of regulatory measures by September 2011 and have in place the requisite developments to require BT and other providers required to allow access to infrastructure by November 2011. See http://www.culture.gov.uk/images/publications/SRP_DCMS_150710.pdf for details.

Licensing Act Responsibility Transferred to Home Secretary and Other Quango Closures

The Government has also announced that responsibility for the Licensing Act 2003, except in relation to regulated entertainment, will be transferred from the Secretary of State for Culture, Olympics, Media and Sport to the Home Secretary. Legislation to give full effect to the change will be brought forward "in due course". The Government said that having just one department responsible for the majority of licensing enforcement and licensing policy decisions would allow for a more consistent approach to tackling some of the current licensing concerns. The Government also announced that the Strategic Advisory Board for Intellectual Property Policy (SABIP) will be closed "in the next year" and its functions transferred to the Intellectual Property Office (IPO). (*Written Ministerial Statement, 20 July 2010; BIS News Release, 19 July 2010*).

DMA Updates Code of Practice on Direct Marketing

The Direct Marketing Association (DMA) has issued the fourth edition of its Code of Practice on Direct Marketing. The Code was updated to bring it into line with new legislation and regulatory rules, including the Consumer Protection from Unfair Trading Regulations 2008, the Charities Act 2006, the Gambling Act 2005 and FSA regulations and the new editions of the CAP and BCAP Codes, which were published in March 2010 and come into force on 1 September 2010. Although the Code has no statutory basis, the DMA asks its members to adhere to it as a condition of their membership - to ensure compliance, the Code is upheld by the industry's independent self-regulatory body, the Direct Marketing Commission. In addition to the Code, a number of Best Practice Guidelines set standards that the DMA say are "desirable to achieve". These Guidelines are supplementary to the Code and are not mandatory except where there is an overlap with the law or with the Code. See <http://www.dma.org.uk/membership/mem-code.asp?rf=y> for details.

Commission's 2009 Annual Report on EU Customs Action to Enforce IP Rights

The European Commission has published its Annual Report on EU Customs actions to enforce intellectual property (IP) rights. The Commission said, "The Report shows an upward trend in the number of goods suspected of violating intellectual property rights. In 2009, over 43,500 cases of such goods were stopped by customs, totalling 118 million articles. The report notes that, while in the past luxury goods were the most hit by IPR infringements, more and more items used by citizens in their daily lives are now affected. Of the top categories detained, cigarettes accounted for 19%, other tobacco products 16%, labels 13% and medicines 10%. China continued to be the main source of IPR infringing products, totalling 64% of the total of IPR infringing articles while other countries such as United Arab Emirates and Egypt accounted for the majority in certain product categories. More than 77% of all detained products were destroyed or a court case was initiated to determine the infringement". (*EC Press Release IP/10/995, 22 July 2010 - see http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/statistics_2009.pdf for the report*).

Article 29 Working Party FAQs on Model Clauses for Transferring Personal Data

The Article 29 Data Protection Working Party has published a FAQ document which they say addresses some issues raised by the entry into force of the EU Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC. They cover issues concerning EEA-based and non-EEA-based processors, including questions about the type of contracts the model clauses apply to, the status of contracts concluded under the previous version of the model clause and whether commercial clauses can be added to them - see http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2010/wp176_en.pdf for details. The Working Party said the FAQs are non-exhaustive and may be updated "as required".

Claim for Commission Owed Under Image Rights Representation Agreement - Whether Agreement Enforceable

The High Court has ruled on a dispute concerning an Image Rights Representation Agreement between the third defendant and the claimant in respect of the first defendant footballer's "image rights". The claimant issued proceedings against the third defendant for arrears of commission alleged to be due to it under the agreement and commission on various contracts which it negotiated on behalf of the fourth defendant company for the benefit of the first defendant's wife, the second defendant. The claimant offered sports management services and had signed an Image Rights Representation Agreement with the first defendant when he was 16 and starting to make a name for himself as a professional footballer - the first defendant had assigned his rights to the third defendant for the purposes of the agreement. The arrangement was subsequently ended by means of a letter which purported to terminate the image rights representation agreement. That was accepted by the claimant as a repudiatory breach or renunciation of the agreement. The court described the dispute thus - "In commercial reality, the current dispute reflects the tug-o'-war between [the claimant] ... over the right to represent [the first defendant] on and off the pitch. But, in formal terms, the present action primarily involves a claim by [the claimant] against [the third defendant] for arrears of commission said to be due to it under the Image Rights Representation". In a lengthy judgment the court ruled that the Image Rights Representation Agreement was not void for mistake but was unenforceable by the claimant as being in unreasonable restraint of trade. It said the claimant could not, therefore, recover, as a matter of contract, any sums which remain unpaid but which would otherwise have fallen due to it under the terms of the agreement had it not been unenforceable. Nor could it recover any further commission in respect of income receivable in the future by the third defendant under contracts procured by the claimant or pursue any claim for damages for breach of the Image Rights Representation Agreement. It was, however, entitled to a restitutionary remedy in respect of those services which it has provided to the third defendant and in respect of which it has not yet received any remuneration. (*Proactive Sports Management Ltd v Rooney & Ors* [2010] EWHC 1807 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/1807.html> for the judgment).

Broadcasting

Competition Commission Invites Comments on Notice to Vary CRR Undertakings

The Competition Commission is inviting comments about its notice of its proposal to accept undertakings, pursuant to the section 88(2) of the Fair Trading Act 1973, to vary the Undertakings given by Carlton Communications Plc and Granada plc to the Secretary of State for Trade and Industry. In October 2006, ITV asked the Office of Fair Trading (OFT) to review those clauses of the Undertakings relating to the contracts rights renewal (CRR) remedy. In May 2009, in exercise of its powers under Schedule 24, paragraph 16, of the Enterprise Act 2002, the OFT published its advice to the Commission recommending that the Commission should review the Undertakings and consider variations to them. The Commission published its report entitled Review of ITV's Contracts Rights Renewal Undertakings in May this year - the details of the variations are included in the notice and the Commission has also published a draft of the revised Undertakings, which shows the effect of the changes. See http://www.competition-commission.org.uk/inquiries/ref2009/itv/pdf/itv_crr_notice_of_proposal_to_accept_undertakings_from_ITV_160710.pdf for details.

DCMS Announces No Change to Current Free-to-Air List until After Digital Switchover

The DCMS has announced that there will be no changes made to the current list of free-to-air events until Digital Switchover in 2012 and that a review of the list will now be deferred until 2013. The Minister for Sport said he "fully supported" the principle of protecting major sports events for free-to-air coverage and that "with Digital Switchover concluding in 2012, this will result in the widespread availability of a significantly increased number of television channels, many of which will be free to air and reach the majority of viewers". As a result, the current list of events which are protected will remain unchanged for the moment - see

http://www.culture.gov.uk/news/media_releases/7287.aspx#list for the list. *DCMS News Release 080/10, 21 July 2010*).

Government Asks CCPR to Review Voluntary Code for Sports Broadcasting

The DCMS has also announced that it has asked CCPR to review its voluntary code of conduct for sports broadcasting with a view to generating a funding boost to grassroots sport. The review will seek to establish if the signatories to the code can increase the proportion of proceeds from the sale of broadcasting rights which go to grassroots sport from 5% to 30% or a third. The voluntary code, initiated by CCPR, "codifies the key TV broadcast rights owners' commitment to ensure that their events are generally available on free-to-air television in the UK (in live or recorded form) while securing the best possible financial return for their sport. The code also commits the governing bodies to reinvest at least 5% of their broadcasting revenue in grassroots development". The signatories to the code are the All England Lawn Tennis Club/Lawn Tennis Association (joint), the England and Wales Cricket Board, The Football Association, the Premier League, the PGA European Tour, The R&A, the Rugby Football League and UK Athletics - see <http://www.ccpr.org.uk/Resources/CCPR/Documents/Word/Voluntary%20Code%20of%20Conduct%20-%20FINAL.doc> for the Code. CCPR said more details of the review and its terms of reference will be released "in due course". (*DCMS News Release 079/10, 20 July 2010*).

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published, with details of adjudications on breaches of Rules 2.8 (demonstrations of the occult or paranormal must not contain life-changing advice), 6.2 (due weight must be given to the coverage of major parties during the election period), 6.4 (discussions about election issues must finish when the poll opens), 6.9 (if a candidate takes part in an item about their constituency then candidates of each of the major parties must be offered the opportunity to take part), 6.10 (broadcasters must offer the opportunity to take part in discussions to all candidates within the constituency or electoral area representing parties with previous significant electoral support or where there is evidence of significant current support), 10.3 (products and services must not be promoted in programmes) and 10.4 (no undue prominence may be given in any programme to a product or service) of the Broadcasting Code. Ofcom also recorded a breach of Rule 4 of COSTA (no more than 12 minutes of ads or telemarketing in one hour of broadcasting). See <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb162/issue162.pdf> for details.

Commission Authorises Participation in Italian DTT Tendering Process

The European Commission has announced that it has authorised Sky Italia, the Italian subsidiary of Newscorp, to participate in the future tender for the allocation of nationwide digital terrestrial television (DTT) frequencies in Italy. The Commission acknowledged that in giving the authorisation, it was relieving Sky Italia of one of the commitments it had given in 2003 when Newscorp acquired the whole of Stream and merged it with rival pay TV operator Telepiù. The Commission said, having regard to the "significant changes" in the Italian TV market in recent years it was appropriate to accede to Sky Italia's request but to limit its bidding to one frequency and, should the Italian Authorities decide to allocate it to Sky Italia, to limit its use to operate exclusively free-to-air channels for a period of five years. The decision will allow the company to bid for one multiplex and to use it only to broadcast free-to-air TV - not pay-TV - for a period of five years. The commitment, which prevented it from participating in the public tender for the allocation of DTT frequencies or multiplexes, would have ended on 31 December 2011 and the switch from analogue to digital terrestrial TV will be completed in 2012. The frequencies tendering process has yet to take place. (*EC Press Release IP/10/983, 20 July 2010*).

Commission Approves Spain's Tax Measures to Support Public Broadcaster

The European Commission has also announced that it has approved the tax-based funding system for the Spanish public broadcaster RTVE, on which it had opened a formal investigation under EU State Aid rules in December 2009. Spain abolished advertising and other commercial activities of RTVE and replaced this income by new taxes on TV and telecommunications operators. Spanish Law 8/2009 of 1 September 2009 provided that advertising, teleshopping, merchandising and pay-per-view services at RTVE would be discontinued with immediate effect and the Government would compensate RTVE for the abolition of these revenues with specifically dedicated income, generated from two new fiscal measures and one existing measure, in addition to the existing state financing: a tax on the revenues of free to air commercial broadcasters (3%) and pay-TV broadcasters (1.5%); a 0.9% tax on the revenues of electronic communications operators and a share of 80% of the already existing levy on radio spectrum use, up to a maximum of €330 million. The Commission had concerns about the compatibility of the new taxes with EU law, in particular the rules on electronic communications networks and services, however, it has now concluded that the compatibility of the aid to RTVE is not affected by the legality of the new taxes and that the

measure is in line with the State Aid rules, because it ensures that RTVE will not be overcompensated for providing public broadcasting services. The Commission said "Spain's choice to place greater emphasis on RTVE's public service mission as part of the reform of public service broadcasters is in line with the policy of media plurality which the EU supports". (*EC Press Release IP/10/978, 20 July 2010*).

Commission Approves Annual Funding for France Télévisions

Still on the subject of State Aid for public service broadcasters, the European Commission has announced it has approved the annual funding mechanism for France Télévisions, the largest French broadcasting group. Under the mechanism, France Télévisions receives a share of the revenue from the public service broadcasting contribution (previously the television licence, approved by the Commission in 2005) in addition to a subsidy from the national budget. The annual subsidy is based on the legislation on the new public broadcasting service, under which advertising on public channels will be reduced and ultimately abolished altogether by the end of 2011. The Commission said the reform "involves the gradual elimination of advertising on public channels and the introduction of two taxes, one on advertisements and the other on electronic communications. It also entails a new set of specifications unique to France Télévisions which further consolidates its general-interest mission and its specific place in French broadcasting". The Law provides financial compensation for the removal of advertising, which accounted for 25% to 30% of France Télévisions' annual income before the reform. In September 2009, the Commission had approved the award of an annual subsidy of up to €450 million and launched a formal procedure to investigate certain aspects of the annual subsidy for subsequent years, which could add up to over €1.5 billion by 2012. The Commission said it was "concerned about the possible use of the revenue from the new taxes to finance the annual subsidy and the danger of over-compensation for public service costs up to 2011-2012". The procedure also enabled the Commission to take account of the comments by interested third parties and competitors before reaching a final decision, thereby enhancing legal certainty. The Commission concluded that the definition of the public broadcasting mission vested in France Télévisions and the checks to which it is subject comply with the State Aid rules and, in particular, with the Commission Communication on State Aid for the funding of public service broadcasters. The Commission said it "has therefore approved the annual subsidy mechanism for an unlimited period. This should enable France Télévisions to continue the ongoing reforms with greater legal certainty about the funding of its public service mission and compatibility with the EU's State Aid rules". (*EC Press Release IP/10/979, 20 July 2010 - the Commission also noted "to date the General Court of the European Union has rejected appeals by competitors against the Commission decisions of 2003, 2005 and 2008 approving various public funding measures for France Télévisions"*).

Gambling & Betting

Government to Investigate Using Abandoned Betting Accounts and Unclaimed Winnings

The DCMS has announced that the Government is going to be looking into the issue of abandoned betting accounts and other "unclaimed" winnings. A report has been commissioned, which will look at how much money is left abandoned in betting accounts and uncover the value of unclaimed winning tickets. In announcing the review, the Government said, "If the rightful owners of these winnings cannot be located the cash could be put to good use, benefitting local communities through investing in sport". Work will need to be done to determine how a betting account can be classed as "dormant" and clarify any legal ramifications surrounding the use of the money. The Government said the potential legal rights of any claimants will need to be an important consideration when looking at the scope of a proposal. Customers will still be able to reclaim their money at any time if they are able to prove their right to it. (*DCMS Press Release 76/10, 20 July 2010*).

World Cup Declared Clean (At Least From a Betting Point of View)

The European Sports Security Association (ESSA) has reported that following a "thorough" investigation of all betting activity among its 13 members in the run up to and during the recently concluded World Cup, not one individual instance of suspicious betting activity had been detected and referred to football authority FIFA. ESSA provides assistance to FIFA by sharing intelligence from its network of leading European bookmakers on any suspicious betting behaviour - ESSA noted that in the past two years, its Early Warning System has passed on only five suspicious alerts across all sports to relevant governing bodies, despite monitoring an average of 10,000 separate bets each week across its membership.

Litigation

Article - ADR and Libel Claims

The latest New Law Journal has an interesting opinion about the benefits of using ADR to resolve libel claims. The article starts with the example of the recently settled claim by the former bodyguard to Michael Jackson who had brought what commentators had described as a "spurious" claim and which the defendant in the action said illustrated the "chilling effect exorbitant legal costs in CFAs (conditional fee agreements) - funded libel claims - have on broadcasting and freedom of expression". The article notes "Alternative dispute resolution (ADR) procedures work well in most forms of litigation, but it is also necessary to ensure that libel proceedings do not lag behind" and makes the point that claimants with a good case are often "reluctant to go down the ADR route because defendants can use it as a means of squeezing out of the damages that they are entitled to" - it suggests that practical experience suggests that this is a form of resolution which could be explored in the face of the proposals to reform libel laws and limit CFAs in publication proceedings currently being debated. (*"Double Trouble?"* (2010) NLJ, Vol 160, 989 - this article is available from LexisNexis).

Publishing

Statement in Open Court - Advertisement Falsely Implying Claimant's Responsibility and Allegations of Lying

The claimant, the founder of a budget airline, brought a libel action against the second defendant airline company and its chief executive, the first respondent following the publication of a series of advertisements in national newspapers and on the defendant airline company's website concerning the flight on-time statistics of the claimant's airline, which had not been published on the claimant's airline's website for 37 weeks. The advertisements contained a picture of the claimant, which likened him to Pinocchio and urged him to publish the relevant statistics. The claimant had asked the defendants to withdraw the advertisements however the manner of their refusal to do so was said to be calculated to generate further publicity. The defendants eventually accepted that the advertisements should not have been published and apologised unreservedly to the claimant. They undertook not to repeat the advertisements and accepted that the claimant had not lied about the on-time statistics and that he was not responsible for the management team's decision not to make the information publically available. The defendants agreed to pay damages and costs and also publish apologies in a number of newspapers and on the second defendant's website. (*Haji-Ioannou v O'Leary & Anor, Unreported, QBD, 15 July 2010*).

Competition Commission Cancels Getty/Rex Features Reference

A previous edition of the Need to Know mentioned the reference to the Competition Commission under section 33 of the Enterprise Act 2002 regarding Getty Images Inc's proposed acquisition of Rex Features Ltd. The question for the Commission was whether the acquisition would result in a substantial lessening of competition within UK goods and services markets including the market for the supply of archive and live entertainment-related editorial images. The Commission has now announced that the reference has been cancelled under the Competition Act 1998, Schedule 7 as it has received the requisite assurances from Getty under section 37(1) of the Act that acquisition has now been abandoned. See http://www.competition-commission.org.uk/inquiries/ref2010/Getty_Rex/pdf/100721_cancellation_final%20notice.pdf for details.

Consultations & Reports

Ofcom Report - The Communications Market: Digital Radio Report - <http://stakeholders.ofcom.org.uk/binaries/research/radio-research/digital-radio-reports/report210710.pdf> (Ofcom's first annual Digital Progress Report details developments in the digital radio market - it includes data on digital radio devices share of radio listening. Ofcom noted that future reports will also include information on the coverage project, designed to measure current levels of FM and DAB coverage).

Ofcom Consultation - The UK Communications Infrastructure Report - Ofcom's Proposed Approach to its New Reporting Duty - <http://stakeholders.ofcom.org.uk/binaries/consultations/uk-comms-infrastructure/summary/uk-comms-infrastructure.pdf> (The Digital Economy Act 2010, which came into force in June, imposes on Ofcom a new duty to report to the Secretary of State every three years on the UK's communications infrastructure - this Report sets out Ofcom's initial views on the types of technical data it thinks it will need to collect for the first report).

OFT Consultation - e-consumer Protection - A Public Consultation on Proposals - http://www.offt.gov.uk/shared_offt/consultations/eprotection/oft1252con.pdf (In July last year, the UK Government has asked the OFT to develop a longer term national strategy for consumer protection on the Internet. The objective of the strategy, to be delivered by the end of 2010, is to enable the OFT, local authority Trading Standards Services and other agencies to work together more effectively. The result of the strategy will be to improve effectiveness of online markets, thereby increasing the level of sustainable trust - the OFT is now consulting on three key areas - promoting business compliance, developing effective enforcement and empowering consumers and will be publishing further details in its Strategy document, which is due to be published at the end of the year).

Ofcom Statement - A Review of Consumer Complaints Procedures - http://stakeholders.ofcom.org.uk/binaries/consultations/complaints_procedures/statement/statement.pdf (From 2011, all communications providers will have to include information of the relevant dispute resolution service on all paper bills. Ofcom's Statement sets out details about the establishment of single mandatory Code of Practice with minimum standards for how providers must handle complaints from phone and broadband consumers - the Code of Practice will provide consistency in standards and will give Ofcom powers to take enforcement action against those providers who do not treat complainants fairly and will require providers to ensure the fair and timely resolution of complaints, and have procedures that are transparent and accessible so that consumers can easily find out how to make a complaint. The Code will come into force on 22 January 2011 and the new requirements to improve awareness of dispute resolution services will come into force on 22 July 2011).

European Commission Consultation - Public Consultation on the Impact of Options Currently Under Consideration for the Revision of the R&TTE Directive - http://ec.europa.eu/enterprise/sectors/rtte/public-consultation/files-public-consultation/public_consultation_on_impacts_rtte_revision_en.pdf (The R&TTE Directive establishes a framework for the placing on the market, free movement and putting into service in the European Union of radio equipment and telecommunications terminal equipment. The Commission has noted that there is currently low levels of compliance with the Directive and is proposing two options to improve the situation - introducing product-conformity assessment requirements and market-surveillance mechanisms in line with the EU "products marketing" package or introducing an obligation for manufacturers to register their products on an EU-wide system before placing them on the market).