

This is our summary of some of the key legal developments across a range of sectors for the week of 15 June 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

Digital Britain - The Final Report

Given the amount of comment and speculation which was taking place prior to the publication of the much-anticipated Digital Britain Final Report it might be asked what surprises the 245-page document might have left? Actually, quite a few (and this does not take into account the political speak that litters the report). The Digital Britain Final Report starts with lofty aims - to be a "guidepath" for how Britain can "sustain its position as a leading digital economy and society" and in doing so it brings forward a number of specific policy proposals, decisions and recommendations, some of which were first announced in the Interim Report. The "broad-reaching" report includes steps for expanding broadband access and transitioning towards digital radio, among other things, and most of the discussion carries some level of importance for the music industry. But what have been described as the most pressing aspects include proposals to curb copyright infringement and it is here that some of the more opposing differences of opinion arise - not surprising really, given the breadth of the issues the Report deals with and the differing views of the various interested parties. In the highly anticipated area of "the creative industries in the digital world" or more accurately, copyright infringement, it says, "Commercially-led solutions remain by far the preferred approach. The Government will look to Ofcom to work with Government departments and other regulators to produce guidelines on how technical measures could be sensibly incorporated within bilateral commercial agreements in a way which will not conflict with other policies, such as those covering privacy". The Report goes on to say, "the Government will legislate to provide an underpinning for these market models and to create an enforcement climate that will focus consumers on legal sources of content rather than unlawful ones". The Government will therefore be consulting on a proposal to legislate to give Ofcom a duty to take steps aimed at reducing copyright infringement. In order to fulfil that duty Ofcom will require ISPs to accept two specific conditions - to notify account holders, in an agreed format, that their account appears to have been used to infringe copyright and maintain and make available (on the basis of a court order) data to enable the minority of serious repeat infringers to be identified. It says that this will allow targeted court action against those responsible for the most damaging breaches of copyright. The Government will also provide for backstop powers for Ofcom to place additional conditions on ISPs aimed at reducing or preventing online copyright infringement by the application of various technical measures. The Government proposes to specify in the legislation what these further measures might be: blocking (site, IP, URL), protocol blocking, port blocking, bandwidth capping (capping the speed of a subscriber's Internet connection and/or capping the volume of data traffic which a subscriber can access); bandwidth shaping (limiting the speed of a subscriber's access to selected protocols/services and/or capping the volume of data to selected protocols/services); content identification and filtering - or a combination of these measures. Ofcom will be asked to set a baseline for measuring infringement following which a code covering notifications and identification of egregious offenders will become operational; there will then be a further measure of unlawful file-sharing activity after the code has been operational for 6 and 12 months to test the efficacy of the notification procedure by the ISPs and the execution of legal action by the rights holders. If it is then clear that there has not been a significant reduction in unlawful file sharing (a 70% reduction target is proposed), Ofcom should move to use its backstop powers to introduce those additional measures. In order to exercise their (as yet unspecified) reserve powers Ofcom will need to consult and to make an Order in Parliament. Some have already described the proposals as "digital dithering" - the "suite of technical measures" to reduce illegal filesharing has been met with a muted response from the industry. Other areas for proposed legislative change include changing the radio licensing regime to enable digital coverage to be extended and encourage investment by the commercial sector as well as the BBC in digital content; developing and implementing the Broadband Universal Service Commitment (so as to provide universal coverage of 2Mb/s broadband by 2012); encouraging investment in and the creation of high quality public service content which also takes into account the shift to digital; and amending the Video Recordings Act to take into account changes to the way in which video games are classified in the UK. Proposals dealing with the BBC Licence Fee have also been met with opposition - the BBC Trust, in a strongly-worded list of objections, has already warned it will not "sit quietly by" whilst the licence fee becomes a general "slush fund" (see http://www.bbc.co.uk/bbctrust/news/press_releases/2009/digital_britain_resp.html for its response). The Government has said it will shortly publish a consultation document on the proposal to take some of the licence fee from the BBC to fund ITV regional news. See <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf> for the Final Report, and for the really keen, the accompanying 195-page Impact Assessment - [see http://www.culture.gov.uk/images/publications/digitalbritain_impactassessment.pdf](http://www.culture.gov.uk/images/publications/digitalbritain_impactassessment.pdf) (and if anyone can make sense of the what the PM means in his opening sentence - Only a Digital Britain will enable us to demonstrate the vision and dynamism that we have to shape the future - please let us know...).

IPO's Proposals to Improve Copyright Licensing and Increase Financial Penalties

Following the publication of the Digital Britain Final Report (see above for details) the Intellectual Property Office (IPO) has published details about proposals to improve copyright licensing and increase the amount of financial penalties that

may be imposed on online infringers. The proposals include making legislative changes in respect of license orphan works to remove the infringement risk that currently prevents collecting societies licensing orphan works; introducing new powers for the Government to authorise collecting societies to set up extended licensing schemes to allow certain collecting societies to act for a group of rights holders even if they are not all members of the society, unless a specific rights holder has opted out of the scheme; underpinning the operation of collecting societies with a statutory backed framework; consulting on improving the operations of collecting societies; and ensuring matched penalties for online and physical IP infringement, which will introduce a statutory maximum penalty of £50,000 for all IP offences. (*IPO Press Release, 17 June 2009* - see <http://www.ipo.gov.uk/about/press/press-release/press-release-2009/press-release-20090617.htm> for details).

IPO's Summary of Responses to Rights Agency "Straw Man" Proposal

The IPO has also published a summary of the responses it received to its proposal regarding the establishment of a Digital Rights Agency. The responses showed that there was generally a lack of consensus (described by the IPO as a "mixed response") across the different interest groups about the role of a potential digital-rights agency. Those in favour of the proposals were rights holders and collecting societies who welcomed a role for an agency in the management of rights online, which would push ISPs to take some responsibility for the traffic on their networks. The most negative responses were, not surprisingly, from ISPs who were concerned about any potential agency or legislation that might impose obligations upon them to take action against their customers, including suggestions that they should constrict or "shape" the bandwidth of those who are suspected of infringing copyright. The proposals however were intended to encourage debate on the proposal (the straw man approach), rather than invite comment on a policy that was likely to be implemented - see <http://www.ipo.gov.uk/strawman-responses.pdf> for details. (Note however that the straw man notion of a Rights Agency was quietly burned by the Communications Minister, in favour of a greater role for Ofcom).

PWC Report on Global Entertainment & Media Outlook 2009 - 2013

According to the recent PricewaterhouseCoopers LLP report on the Global Entertainment & Media Outlook 2009 - 2013, the entertainment and media (E&M) sector in the UK will experience a cumulative 7.2% decline in revenue from 2008 - 2010, falling in value from \$92 billion to \$85 billion. According to the report, there will continue to be a decline over the next two years. The report suggested a rebound beginning in 2010, and found that internet access, internet advertising, TV subscriptions and license fees, filmed entertainment and video games would be the only segments that will be larger in 2013 than they were in 2008. In contrast, it found that four sectors - recorded music, business-to business publishing, newspaper publishing, and consumer magazine publishing - would suffer actual declines in total global revenues during the forecast period as a whole. (*PWC News Release, 16 June 2009; the full report is available from PWC*).

Broadcasting

Second Reading for Private Members Bill on Defining Public Service Content

The Private Member's Broadcasting (Public Service Content) Bill has had its Second Reading in the House of Commons. The Bill seeks to define public service content for the purposes of public service broadcasting. The debate considered the proposed criteria for establishing public service content - the first criterion would be that it should comprise "local, national, international news or current affairs which is impartial, factual and objective" (it noted Clause 1(2) proposes that public service content should be "content which is primarily produced in the United Kingdom"); the second element of "public service content" should include content whose primary purpose "is to inform, educate or entertain children"; the third category is content whose primary purpose is "charitable or religious" (which "spoke for itself"); and the fourth criterion would be content that was not otherwise likely to be provided by the market responding to consumer demand. The debate, which did at times raise some interesting points about the future and general remit of the BBC as well as the prospects of a future Conservative Government, was eventually adjourned to mid-October. (*House of Commons Debates, 12 June 2009*).

Corporate

GC100 Response to FRC Combined Code Queries

The GC100 has published its response to the Financial Reporting Council's call for evidence on the effectiveness of the Combined Code, in which they set out various recommendations based on the practical experience of dealing with the Code on a daily basis against the background of the current perceived failures of governance in the financial services sector in respect of directors' statutory duty to avoid conflicts of interest, the role of non-executive directors and the Board, remuneration, risk management and institutional shareholders. They also deal with the specific questions raised by the FRC about the operation of the Code. The response is available via PLC. At the same time, the Association of Investment Companies (AIC) have also published their response (see <http://www.aic.co.uk/Documents/Technical/AICconsultationresponseCombinedCodeJune2009.pdf> for details) - the AIC make the rather sensible point that "the profile and impact of the Combined Code could be improved if the FRC changed its title" and recommend that it be changed to "The UK Corporate Governance Code", which they say "would better reflect

the content of the Code and encourage greater interest by all investors, including retail shareholders, and by the media". They also make a number of recommendations for strengthening the Code (by either name), including adopting a more outcome-based system which is focused on delivering results.

Gaming

DCMS Announces PEGI Classification System for UK Video Games

The DCMS has announced that the PEGI (Pan European Game Information) system, currently used in most European countries, will become the sole method of classifying video games in the UK, replacing the current hybrid system that has two separate sets of symbols, either of which can appear on video games. The Video Standards Council (VSC) will take a statutory role with a mandate to implement the PEGI classification system for all video games in the UK. The new system will extend PEGI's remit so that all games are classified using the PEGI symbols. Information on the content of each game will be submitted to PEGI administrators including the VSC, which will then review each game to ensure it complies with the law. After evaluation, the manufacturer will receive a licence to use the PEGI rating logos. The VSC "will take account of UK sensibilities, and will have the power to ban games that are inappropriate for release in the UK". The new classification will apply in conjunction with the classification of films and DVDs carried out by the British Board of Film Classification. (*DCMS News Release 092/09, 16 June 2009*).

Music

FAC Call for Work to Define Serious, Repeat Infringers

The Featured Artist Coalition (FAC) has been quick in its response to Digital Britain Final Report (see above for details). The FAC has said it wants to work with Government and other parts of the music industry to develop an agreed definition of a "serious, repeat infringer" as it "continues to believe that it is wrong to criminalise ordinary music fans for file sharing". The FAC said it welcomed the announcement of digital test beds and said continued innovation would only be possible if content owners and ISPs worked collaboratively together. The Final Report had announced that the Government would be consulting on a proposal to legislate to give Ofcom a duty to take steps aimed at reducing copyright infringement by requiring ISPs to notify account holders that their accounts have been used to infringe copyright and maintain and make available information that would enable the identification of serious repeat offenders when required to do so (by court order). Hence the need for clarification, according to the FAC. (*FAC Press Release, 17 June 2009*).

Publishing

Bloggers and Disclosure of Identity - A Public Not Private Activity

The High Court has refused to grant an injunction to protect the anonymity of a police officer, who had been writing a popular blog about policing from a rather critical insider's perspective. The claimant sought the injunction to prevent him being named by The Times newspaper, arguing that it could put him at risk of disciplinary action for breaching police regulations. In making the ruling the court acknowledged that it had been "submitted that the thousands of regular bloggers who communicate nowadays via the Internet, under a cloak of anonymity, would be horrified to think that the law would do nothing to protect their anonymity if someone carried out the necessary detective work and sought to unmask them" although it also said that it suspected that "some would be very concerned and others less so". However, it said it had to be demonstrated that there would be a legally enforceable right to maintain anonymity, in the absence of a genuine breach of confidence. Further, "the mere fact that the claimant wishes to remain anonymous does not mean either that he has a reasonable expectation of doing so or that The Times is under an enforceable obligation to him in that respect". The court said the applicant could have no reasonable expectation of anonymity because blogging was essentially a "public rather than a private activity". Further it said, "It would seem to be quite legitimate for the public to be told who it was who was choosing to make, in some instances, quite serious criticisms of police activities and, if it be the case, that frequent infringements of police discipline regulations were taking place". As a result of the blogger's identity being disclosed he has been "spoken to regarding his professional behaviour and, in line with disciplinary procedures, has been issued with a written warning". The blog has also been closed down. (*The Author of a Blog v Times Newspapers Limited [2009] EWHC 1358 (QB)* - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/1358.html> for the judgment).

Lords Lift Reporting Restriction Order Concerning Acquitted Rapist

The House of Lords has delivered its Opinion in relation to an Application by the British Broadcasting Corporation to set aside or vary a Reporting Restriction Order which had been made in 2000 to protect the identity of a man who had been charged with rape but acquitted by the direction of the trial judge under what had been described by some papers as a "DNA loophole" (which related to the collection and retention of DNA samples). The Lords decided that the reporting restriction order should be set aside - the anonymity order imposed in relation to an Attorney General's reference concerning the defendant acquitted of rape was discharged, as the defendant's right to privacy under the Article 8 of the

European Convention on Human Rights 1950 was outweighed by a broadcaster's right to freedom of expression under Article 10. It was said "The principle of open justice, which lies at the heart of public confidence in the criminal justice system permits the free reporting of criminal trials and the proper identification of those who have been convicted and sentenced ... It permits the proper identification of those who have been acquitted too". (*Attorney-General's Reference No 3 of 1999: Application by the British Broadcasting Corporation to set aside or vary a Reporting Restriction Order [2009] UKHL 34* - see <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090617/attgen.pdf> for the Opinion).

OFT's Final Report on Local and Regional Media Merger Regime

The Office of Fair Trading (OFT) has published its Final Report reviewing the local and regional media merger regime. The review had been undertaken at the request of the Secretary of State for Business and looked at the merger regime as it applied to the local and regional media sector, with a particular focus on the press. It found that the existing regime, which is designed to protect competitive rivalry between firms for the benefit of consumers, warranted no further research by the OFT - it said the regime was "already capable of reflecting market developments, such as increasing competitive constraints between media, when assessing local or regional media mergers" and that it was also capable of taking account of valid "failing firm" arguments, efficiencies and customer benefits. It did say however that in media mergers involving newspaper publishing and/or commercial radio or television broadcasting, and raising competition issues, it would ask Ofcom to provide views on factors relevant to its decision, as a result of its understanding of media markets. See http://www.offt.gov.uk/shared_offt/mergers_ea02/oft1091.pdf for the Report, which also provides guidance to market participants and interested parties.

Sport

Employment Status of Rugby Head Coach Dismissed for Poor Results

The claimant, who had had a career in rugby and coaching for which he had formal qualifications, had been approached by representatives of the second defendant, a company that had been incorporated to provide a formal business structure for the first defendant's sporting activities, to be the head coach and director of rugby with the first defendant. The first defendant was a semi-professional rugby club. The claimant took the position but the club suffered from poor results and took the decision to replace the claimant and began a search for a replacement. The claimant was summarily dismissed and appealed. An Employment Tribunal found that the claimant's contract had been with the second defendant and that he had elected to be paid as an independent contractor through a limited company he acquired for that purpose, rather than on a PAYE basis. The claimant appealed the Tribunal's decision. The Employment Appeal Tribunal ruled that the decision of the Tribunal was based on the facts as it found them and was unassailable - the claimant's contractual relationship was with the second as opposed to the first defendant but the claimant's status did not depend upon the identity of the other contracting party. The claimant's preferred option (the one he eventually decided to take) was to operate through a limited company, which gave him the status of being self-employed. (*Lambden v Henley Football Club & Anor [2009] All ER (D) 120 (Jun)*).

Reasonableness of Assessment of Damages for Loss of Future Earnings as Professional Footballer

The appellant appealed an assessment of damages which had been made after he admitted liability for the personal injuries sustained by the respondent during a football game. The respondent never regained his former ability at playing football and subsequently stopped pursuing a career of playing professionally. Damages were agreed in part but the court assessed the loss of future earnings. The judge accepted evidence that the worst scenario was that the respondent would have played throughout his career for a Championship club and awarded £3,854,328 for loss of future earnings. The Court of Appeal held that the judge had not erroneously assessed loss of future earnings suffered by the respondent by finding that it was most likely that he would have played football for a Premiership League club. A 15% discount to reflect contingencies, including the fact that the respondent would not reach such a high level, was not too low, particularly as only a small possibility of a longer period in the Premiership would have a marked effect on his lost earnings. (*Smith & Anor v Collett [2009] EWCA Civ 583 - the judgment is available via Lawtel*).

New Legislation - Safety of Sports Grounds Order for Cardiff City Stadium

The Safety of Sports Grounds (Designation) (No 2) Order 2009, SI 2009/1394 comes into force on 3 July 2009. The Order designates the Cardiff City Stadium, occupied by Cardiff City Football Club Limited and Cardiff Blues Limited, as a sports ground requiring a safety certificate under the Safety of Sports Grounds Act 1975. Safety certificates contain such terms and conditions as the local authority considers necessary or expedient to secure reasonable safety at the sports ground and section 1(1) of the 1975 Act provides that the Secretary of State may designate any sports ground which in his opinion has accommodation for more than 10,000 spectators as a sports ground requiring a safety certificate. See http://www.opsi.gov.uk/si/si2009/pdf/ukjsi_20091394_en.pdf for details.

New Legislation - Football Spectators Seating Order for Cardiff City Stadium

The Football Spectators (Seating) Order 2009, SI 2009/1395 also comes into force on 3 July 2009. This Order directs the Football Licensing Authority to include in any licence to admit spectators to the Cardiff City Stadium a condition imposing the requirement that only seated accommodation is to be provided for spectators at a designated football match and that spectators shall only be admitted to watch such a match from seated accommodation. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091395_en.pdf for details.

Technology

Commission Calls for Greater Independence and Accountability for Internet

The European Commission has adopted a Communication which analyses progress on Internet governance and the changing role of governments in the process. The Communication starts with the premise that Internet usage and penetration is now so high, especially in developed countries such as those of the EU, that it has become a critical resource, whereby any serious disruption in service can have potentially catastrophic effects on society and the economy. Further, it said that many government and financial services have already migrated so extensively to the Internet that any significant service disruption could seriously inhibit the access of citizens to key services. The Communication states therefore that as a result of the Internet's growing importance for society as a whole, governments are increasingly required to be more actively involved in the key decision making that underlies the Internet's development. The Commission agreed however that private companies should continue to take the lead in the day-to-day management of the operation of the Internet, as long as they were accountable and independent. The Commission also believed that decisions about the Internet, especially those about openness and security, should be taken in a transparent and accountable manner because of their global reach. ICANN currently operates under a Joint Project Agreement with the US Department of Commerce, which expires on 30 September 2009 and the Commission has already made comments about the importance of its operations via a transparent and accountable framework (and see the Need to Know of 4 May 2009 for details). See http://ec.europa.eu/information_society/policy/internet_gov/docs/communication/comm2009_277_fin_en.pdf for the Communication. (EC Press Release IP/09/951, 18 June 2009).

Commission's Action Plan for Internet of Things

The Commission has also published its Action Plan for promoting the evolution of the "Internet of Things". The Action Plan builds on the Commission's 2007 Communication and deals with issues such as governance, privacy and data protection, risks, standardisation, research, institutional awareness and environmental issues. The Commission said it will, together with all relevant parties concerned, start to implement the plan and report on the relevant activities in a further Communication in three years time. (EC Press Release IP/09/952, 18 June 2009 - see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/952&format=HTML&aged=0&language=EN&quiLanguage=en> for details).

Critical Reception for Commission's Draft Recommendation on NGA Regulated Access

The Commission's draft Recommendation on regulated access to Next Generation Access (NGA) Networks has been published for consultation but already there has been a less than positive response from industry participants about the proposed model to promote investment in new networks by encouraging joint ventures between incumbent and emerging operators to build the expensive infrastructure - critics have said this new approach, while potentially raising investment by pooling resources, could also lead to the creation of de facto duopolies and ultimately hamper competition. It was said that while the incumbents would prefer having no obligations on the prices they impose to operating asking access to their networks, they see a new proposal which would allow national authorities to regulate access to infrastructure as well as the rent or the purchase of services by smaller operators as a threat. The Commission is expected to adopt a Final Recommendation on regulated NGA by the end of the year. (EC Press Release IP/09/909, 12 June 2009; see http://ec.europa.eu/information_society/policy/ecomms/doc/library/public_consult/nga_2/090611_nqa_recommendation_spc.pdf for the draft).

European Commission - High Level Expert Group on Digital Libraries

The European Commission has established a High Level Expert Group on Digital Libraries to advise the Commission on how to deal with the organisational, legal and technical challenges at European level and contribute to a shared strategic vision for European digital libraries. The Commission said that the Group should address copyright and preservation questions relating to digital libraries and access to scientific information, including "exceptions and limitations, voluntary agreements for enhancing online accessibility of in copyright content, user generated content, open access to scientific information and access to and preservation of research data". See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:082:0009:0011:EN:PDF> for the Council Decision establishing the Group.

Consultations & Reports

Ofcom Consultation - Broadcasting Code Review - Proposals on Revising the Broadcasting Code - <http://www.ofcom.org.uk/consult/condocs/bcode09/main.pdf> (Ofcom has said that it has identified four main sections of the Broadcasting Code where it believes revisions are required - Section One: Protecting the Under-Eighteens; Section Two: Harm and Offence; Section Nine: Sponsorship; and Section Ten: Commercial References and Other Matters. It is also considering the introduction of rules for a new genre of Public Information Programming funded by non-commercial, not-for-profit entities (eg, public services), that seek to educate or inform the audience on matters in the public interest, and may also refer to the interests and/or activities of the funder. The revised Code will be published in December 2009).

Ofcom Consultation - Audience Participation in Radio Programming - The Use of Premium Rate Services in Radio: Options for Improving Consumer Protection - http://www.ofcom.org.uk/consult/condocs/audience_participation/main.pdf (Ofcom's consultation builds on the findings of its earlier consultation which focussed on the use of PRS by television broadcasters and proposes three options for regulation of PRS in radio, which will serve to protect consumers and maintain trust in radio broadcasting, while taking account of the specific circumstances which apply to radio)

Ofcom Guidance - Regional Production and Regional Programme Definitions - http://www.ofcom.org.uk/tv/ifi/guidance/reg_prod/ (Ofcom has updated its regional production and regional programme definitions to take account of the recently completed Review of Public Service Broadcasting - the change relates to the issue of what the criteria is for determining that a programme qualifies as "made in the region" - Ofcom had previously stated that it would consider changing the relevant guidance on the definition of regional programmes, to allow studio origination of regional news to take place outside the region - provided journalistic resources are maintained in all parts of all regions)