

# Review

## Licensing Without Hiccups



### INTRODUCTION

In this issue, we consider:

- Brighton Off Licence Appeal Dismissed by Magistrates – the prevalence and impact of cumulative impact policies
- Gaming Machine Test Purchase Operations – on the increase
- Police Reform and Social Responsibility Bill – Royal Assent approaches
- PPL Fee Increase – PPL's proposals on fees for specially featured entertainment
- Court of Appeal Confirm 28 day Representation Period in Albert Hall case – legitimate expectation of residents cannot usurp statutory time limit
- Licence Applications on Insolvency – some key considerations
- Live Music Bill Crosses First Hurdle – proposed partial de-regulation of live music considered

As we approach the summer holiday period, enforcement continues to be high on the agendas of Local Authorities and operators alike. Test purchase operations continue, not just for alcohol, but also for cigarettes and gaming machines. As always, due diligence and clear communication of policies to staff is paramount. In readiness for licensing inspections, operators should ensure that premises are properly displaying their Summary and notice of nomination, a certified copy of the current Licence is on site and the layout of the premises is in accordance with the Licence plans.

With news that Selfridges and Harrods have already unveiled their Christmas displays, operators should also start to consider whether Temporary Event Notices will be required over the festive period to authorise proposed events outside the bounds of the Premises Licence. Remember that additional hours and/ or activities need to be covered; and that there is a current maximum of 12 Temporary Event Notices per premises in a calendar year. This will be increased under the Police Reform and Social Responsibility Bill, but there is no guarantee that this part of the Bill will be in force in time for the planning of Christmas functions.

In terms of budgeting, you may need to build in potential future costs that an increase in PPL fees and an increase in annual fees for Premises Licences will bring. As set out in our report on the Police Reform and Social Responsibility Bill below, the cap for Premises Licence fees going forward is not yet clear, but with fees to be set at a local level on a cost recovery basis, increases are almost inevitable from at least 2013 onwards.

Displaying correct signage continues to be a minefield for some independent operators. The Daily Mail reported on 1 August 2011 that a pub landlady who put up hand written 'no smoking' signs while waiting for official versions, has been ordered to pay nearly £300 (fine and costs) by Llandudno Magistrates. Inspectors found that the signs did not meet the regulations prescribing the size of signage and did not show the required graphic representation of a burning cigarette enclosed in a red circle with a red bar through the cigarette.

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## BRIGHTON OFF-LICENCE APPEAL DISMISSED BY MAGISTRATES

Sainsbury's has lost an appeal against the refusal by Brighton and Hove City Council to grant a Licence for the sale of alcohol in one of its stores. Brighton and Hove operate a cumulative impact policy in the relevant area, with a presumption that all new Licence applications will be refused, including applications for off-Licences. Their decision to refuse the Licence was upheld by Magistrates despite the applicants offering strict and detailed conditions.

Licensing Authorities are currently conducting their tri-annual review of their Statements of Licensing Policy and cumulative impact zones appear to be ever-more popular, with existing zones also increasing in size. Liverpool, for example, is proposing to introduce cumulative impact areas; and Brighton is proposing to increase the area to which their policy applies.

Case law has determined that the surrender of a premises licence in return for a new Licence at another premises cannot of itself overcome a cumulative impact policy (as per an appeal by Novus Leisure against a decision of Westminster in April). Therefore, even in cumulative impact zones it seems unlikely that Licences will have an inherent value as they do in Ireland (where one Licence must be surrendered before another is granted).

However, this latest decision surely underlines the importance of advance due diligence as to whether a premises is licensed, particularly in a cumulative impact zone; and for carefully drafted conditional sale agreements, allowing a purchaser to pull out of a deal if the Licence is refused.

## GAMING MACHINE TEST PURCHASE OPERATIONS

Amidst industry murmurs that test purchase operations on fruit machines are becoming ever-more frequent, the Gambling Commission has recently published a bulletin for Licensing Authorities dealing with their approach to test purchasing.

The Commission states that it “encourages licensing authorities (LAs) that are considering a test purchasing exercise to contact us in advance of any action. Larger operators are now commissioning their own test purchasing work and share these results with us as well as any improvement and training programmes they have in place. To act in a risk-based and proportionate manner and in order that resources are targeted efficiently, LAs are strongly encouraged to take this information into account when planning a programme of test purchasing.”

For operators this means two things in practice: firstly, inform all staff to be vigilant in preventing the use of machines by under 18s; and secondly, ensure you as an operator are duly diligent in providing signage, staff training, a clear ID policy and if possible your own test purchase operations, which are shared with the Commission.

## POLICE REFORM AND SOCIAL RESPONSIBILITY BILL – ROYAL ASSENT APPROACHES

Final amendments were made to the Police Reform and Social Responsibility Bill during its third and final reading on 20 July. When parliament re-convenes after the summer, the Bill will proceed to Royal Assent later this year.

The vast majority of debate during the Bill's passage through the House of Lords, related to the proposals on police reform, as do the final amendments to the Bill. A number of questions were raised within Committee stage as to the licensing proposals, including the potentially inflexible and unwieldy late night levy and the controversial amendment of the test for conditions to be 'necessary' to the less stringent test of 'appropriate'.

However, it seems that the licensing provisions will remain largely untouched, although there has been an indication that concerns raised will be dealt with under revised Guidance to Licensing Authorities and further consultations on: the potential exemptions from the levy; and local fee levels – how they will be calculated and the applicable cap.

As previously reported, the Bill includes far-reaching proposals on the sale of alcohol. Key proposals include:

- Allowing Licensing Authorities to set licence fees at a local level on a cost recovery basis (albeit subject to a national cap to be debated further) which is likely to herald a return to the days of Public Entertainment Licences with distinct cost variations across the country;
- Suspension of Premises Licences for failure to pay annual fees on time, with a 'grace period' of only 21 days;
- Removing the 'vicinity' test to allow any person to submit a representation, although that representation must still be 'relevant' and not frivolous or vexatious;
- Licensing Authorities to become Responsible Authorities within the meaning of the Act – as such they will themselves be entitled to make representations to an application (for example because it is within a cumulative impact area) and to review Premises Licences;
- Changes to Temporary Event Notice (TEN) procedures to allow shorter notice and longer duration TENs, but also requiring that notice is given to Environmental Health as well as the police and Council; and that TENs may be subject to appropriate conditions;
- The introduction of Early Morning Restriction Orders allowing Licensing Authorities to ban the sale of alcohol during the times specified in the Order which can be anywhere between midnight and 6am ;
- The introduction of a Late Night Levy allowing Licensing Authorities to charge an additional fee to businesses where their Licence authorises the sale of alcohol during the times specified, which again can be anywhere between midnight and 6am; and
- Doubling the maximum fine for persistent underage sales from £10,000 to £20,000.

Commentators anticipate that as the Bill provides for the setting of fees on a cost recovery basis, there will be a consultation on fees and the new fee structure is unlikely to fully take effect until 2013. However, other parts of the Act are likely to be in force later this year.

#### PPL FEE INCREASE

Phonographic Performance Limited (PPL) has proposed changes to fees charged for specially featured entertainment in a consultation paper. Currently, the tariff for specially featured entertainment applies only where it is played as a specific attraction, for example within nightclubs.

The consultation paper proposes that they could going forward also consider whether there is dancing (or 'facilities' for dancing with a 'reasonable expectation' that dancing will take place). Furthermore, instead of average audience figures, actual attendance figures will need to be provided. If they cannot be, or are not provided, the venue's *capacity* will form part of the calculation. The number of events and the duration of events will also be variables. They propose that fees will also be raised, with a retention of the 50% surcharge for late payment. They indicate that increases for events with relatively large attendances (over 300) will be higher than those with lower attendance.

PPL propose that the new fees will come into force in April 2012. The deadline for responses to the consultation is 14 October 2011. However, any proposed fee change is subject to review by the Copyright Tribunal.

Please note that this consultation does not affect charges by the Performing Rights Society (PRS) or Video Performance Limited (VPL) but remember that if you require a PPL Licence, you will also require a PRS Licence; and VPL will be required if you play music videos.



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## COURT OF APPEAL CONFIRM 28 DAY REPRESENTATION PERIOD IN ALBERT HALL CASE

The Albert Court Residents’ Association continued to argue in the Court of Appeal that the failure of Westminster Council to send them notification of a Licence application for the Albert Hall breached their ‘legitimate expectation’. This expectation, they argued, had been created by Westminster’s practice of directly delivering notifications of Licence applications to residents in the vicinity.

However, the Court of Appeal has confirmed that regardless of whether Westminster’s procedure of notifying residents of applications within the vicinity created a legitimate expectation, that expectation could not in any event usurp the statutory right of an applicant to be granted a Licence (or variation) if no representations were received within the 28 day statutory period.

## LICENCE APPLICATIONS ON INSOLVENCY – TIME LIMITS AND VOLUNTARY ARRANGEMENTS

In the current climate, we thought it may be helpful to re-iterate some of the key considerations in dealing with the insolvency of Premises Licence holders.

As we have previously reported, the rules changed on 1 October 2010 as to the time limits for Licence applications in the event of insolvency (or death/ incapacity). Previously in these circumstances, an application for Interim Authority or Transfer was required to be made within 7 days or the Licence would lapse permanently. This caused problems in practice.

The provisions were amended to allow an Interim Authority or Transfer application within the amended period of 28 days from the point of insolvency. However, it is important to note that the licence still ‘lapses’ immediately upon the insolvency of a premises licence holder. Therefore an application must still be made as soon as possible if continuity of trade is required. Where a Licence has lapsed because of the insolvency, sales of alcohol are not authorised sales under the Licensing Act 2003, until a valid application for interim/ transfer has been submitted to the relevant Licensing Authority.

It should be noted that a voluntary arrangement proposed by directors (a CVA) is classed as insolvency for the purposes of the Licensing Act. Where a CVA is proposed, it may be worthwhile dealing with the transfer of the licence prior to the approval of any arrangement. Where the directors will still be running the company, the Licences can be transferred either to a named director or to a separate company. This would protect against the lapse provisions in the Act (as the company entering into the CVA would no longer be the ‘premises licence holder’) and allow sales to continue post-approval without any further Licence application.

Where a Premises Licence has not been transferred prior to insolvency and therefore remains in the name of the insolvent company, the Licensing Act permits the resurrection of the licence by interim authority or transfer within 28 days from the point of insolvency. However, there is no mechanism to submit an application after this initial 28 day period. It is therefore essential to ensure a valid application is received by the Licensing Authority before the deadline (the 28 day period is absolute and doesn’t take into account weekends or bank holidays). There are various formalities which must be complied with to ensure that the application is valid.

Furthermore, any interim authority is itself only valid for 3 months. The licence lapses again after this period unless a transfer application is submitted within that time (this can be made in the name of the interim holder). If no transfer application is submitted within three months of the interim authority, again there is no mechanism to resurrect the licence.

In short, if you are dealing with the insolvency of licensed premises, it is essential to consider the requirements under the Licensing Act at the outset.

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## LIVE MUSIC BILL CROSSES FIRST HURDLE

A Private Members Bill designed to encourage live music has proceeded through the first Committee stage in the House of Lords relatively unscathed, although we await the Report stage before the Bill is considered by the Commons.

The Bill provides that (amplified) live music will not be licensable in premises if:

- the premises is authorised for the sale of alcohol for consumption on the premises;
- at the time of the music, the premises are open for on-sales of alcohol;
- the live music is to an audience of no more than 200 persons; and
- the live music takes place between 8am and 11pm.

Furthermore any conditions on existing Licences relating to music will not apply to live music which meets the above test. There is a separate exemption for live unamplified music which takes place between 8am and 11pm, without a specification as to audience numbers and regardless of whether it takes place on alcohol-licensed premises.

However, this will not be a 'carte-blanche' for operators to provide live music without heed to local residents. The Bill also provides that on a review of any premises licence (which, of course, can be instigated by any responsible authority or interested party) a condition can be added that would make such live music licensable and subject to applicable conditions.

The Bill also proposes to remove the requirement to license the provision of 'entertainment facilities' and to de-regulate live music in the work place, subject to the restrictions on hours and audience numbers.

Only a small proportion of Private Members' Bills are ultimately enacted. Often they are a tool for debate and/ or putting matters on the parliamentary agenda. However, the coalition agreed to support the Bill and there is a clear possibility that this Bill will in due course become law. We will report further progress in future editions of 'Licensing without Hiccups' after the parliamentary recess.

## FURTHER INFORMATION

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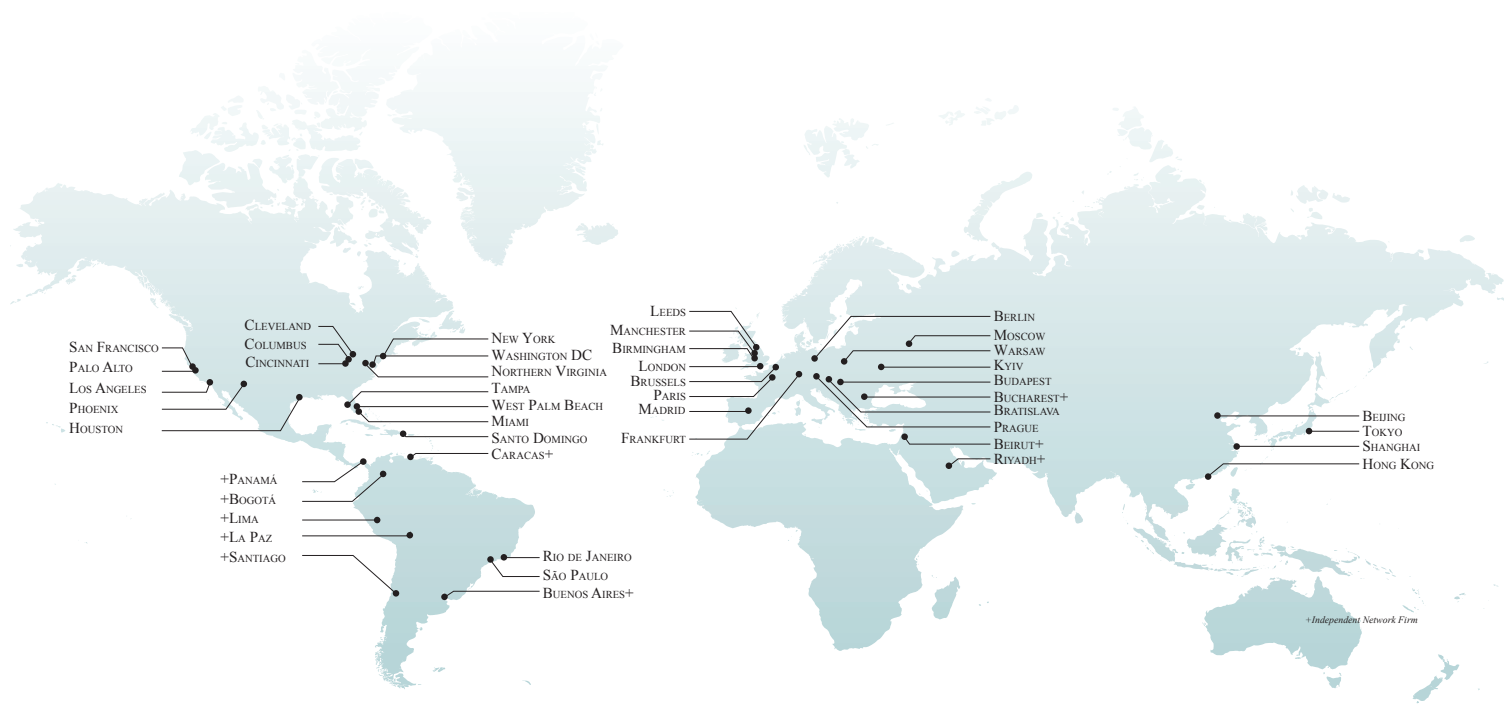
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