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Doing Business in the United Kingdom

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PART III General Private and Commercial Law

CHAPTER 14 Information Technology Law

1-14 Doing Business in the United Kingdom § 14.02

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§ 14.02 Computers

[1] Contractual Aspects

[a] Introduction. On the whole, computer contracts are merely a further species of commercial contract, to which the general principles of contract law apply. However, in the same way as certain other types of contract have, by virtue of the special nature of their subject matter, become regarded as separate categories, so it is with computer contracts. In this section it is not intended to give a full exposition of the law relating to computer contracts, nor to give a practical guide to such contracts; rather it is intended to highlight the ways in which computer contracts are or may be legally different from other contracts.

[b] Hardware. Computer hardware is generally sold, leased on a financial lease, or rented out. Legally these methods of distribution are no different from, for instance, the sale, lease or rental of a motor car, and require no special treatment.

[c] Software.

Computer software for larger systems (including 'mainframes' and other large servers) is normally supplied pursuant to a licence agreement, while software for workstations and micro computers (i.e. personal computers including desktops, laptops and palmtops) is more often sold, either over the counter like an audio CD or a DVD, by mail order, or (increasingly) downloaded from the World Wide Web or by secure internet file transfer ('FTP'). A number of problems arise in relation to these contracts.

[i] Software Licences. It is not entirely clear what a software licence is under English law. It would not seem to be the same as a contract of hire, although it has similarities in that both permit the use of the item supplied during the term of contract. It would not seem to be the same as a normal licence of intellectual property since that does not normally

involve the supply of any tangible object. It would not seem to be a sale since no property in anything (other than the supporting media) is intended to pass.

This problem of classification has certain consequences. The provisions of English law which imply, as a matter of law, certain conditions and warranties into certain types of contract would not seem to apply. Thus while the sale of a central processing unit or terminal will clearly be subject to the provisions of the Sale of Goods Act 1979 as to quality, title, and the like,² the grant of a licence for the software to be used with that equipment would seem to fall outside both the Sale of Goods Act, and the analogous provisions relating to hire contracts and contracts for work and materials, contained in the Supply of Goods and Services Act 1982.³ English courts have indicated they will imply terms similar to those implied by statute, but the question of whether software is goods or services so far has been avoided.⁴

Although the implication of terms as to quality and title in software licences may be a matter of some doubt, it is clear that the Unfair Contract Terms Act 1977 does apply to attempts to exclude any such implied terms that may be found in software licences. Section 7 of the 1977 Act⁵ applies to all contracts under which the possession of goods passes, which are not governed by the law of sale of goods or hire purchase: this would include all software licences under which a tangible medium such as a disk, CD-ROM or DVD is supplied. The Section deals with the extent to which effect may be given to terms excluding or restricting liability for breach of an obligation arising by implication of law from the nature of the contract.⁶

There is doubt, however, whether Sections 2-4 of the 1977 Act⁷ apply in the context of a software licence, by virtue of paragraph 1(c) of Schedule 1 to the Act.⁸ This provides that those Sections (but not any others) do not apply to any contract 'so far as it relates to the creation or transfer of a right or interest in any patent, trademark, copyright ... or other intellectual property, or relates to the termination of any such right or interest'. The better view would seem to be that this exclusion only applies to those provisions of the licence which specifically deal with intellectual property rights, and not to the contract as a whole.⁹

[ii] Sale of Software.

Originally, until the late 1960s, software tended to be supplied by the hardware supplier along with the hardware sale and at no additional or separate charge. Then, until the advent of microcomputers at the end of the 1970s, virtually all software was almost invariably licensed rather than sold, both by the hardware manufacturers as well as by new specialist 'software houses', which came into being with the ending of software 'bundling' at the end of the 1960s. When computer installations were relatively few in number, and software relatively expensive, this was perhaps sensible and was certainly feasible. Each software licence -- even if in a standard form -- could be signed by the parties. The micro computer revolution has, however, changed matters radically. Sales of such computers are now numbered in tens of millions, and the software is often sold by retailers, over the counter like a compact disc or DVD, or by mail order and (increasingly) electronic downloading, e.g. from the Internet. Clearly in these circumstances a licence agreement signed by the parties is impracticable.

The following considerations are relevant to the sale of software:

[A] Property/Copyright Distinction. First of all it should be noted that there is no legal reason why software should not be sold. It has sometimes been suggested that this will prejudice the supplier's ownership of the rights to the software. However, this is clearly incorrect since there is a distinction between the ownership of the copyright in a work, and ownership of the tangible medium recording the work. Thus the sale of a copy of a book transfers ownership of the book but does not carry with it the ownership of the copyright in the literary work embodied in the book.

[B] 'Shrink wrap Licences.' Where copies of a program are sold to the user (by the producer or a distributor) there has been developed in the USA and adopted in the UK, the practice of incorporating a licence agreement between the copyright holder and the user in the packaging of the diskette or CD-ROM. With the licence is a notice stating that if the

seal of the packaging is broken, the purchaser is deemed to have accepted the terms of the licence. Clearly it is intended that there should be two contracts: a contract of sale between the retailer and the purchaser, and a licence between the owner of the rights in the software and the purchaser. There are no direct precedents in English law for this kind of arrangement and there must be doubt as to whether it is effective in the absence of any express acceptance by the purchaser, for example, by the 'return of a user registration card' or some similar device.ⁿ¹⁰

It is now generally accepted that a better approach is for the user to be put on express notice of the terms of the licence before the sale of the package. This could be achieved in a number of ways, and in addition, permitting the purchaser to inspect before the sale will strengthen the ability of the licensor later to enforce the licence terms. Finally, to the extent that the shrink wrap licence is ineffectual at a contractual level, then the position of the user will be governed by the general copyright law, as it applies.

[C] 'Click wrap Licences.' With the advent of the internet and the arrival of electronic purchasing of software, which is typically downloaded rather than physically delivered, a new mechanism has been developed to ensure user acceptance of licensing terms and conditions. This is frequently known as 'click-wrap' licensing. It involves the user or purchaser being required to click on a button in order to signify acceptance of the terms associated with the relevant software package as a pre-condition of the download proceeding. A similar mechanism is also found at the time of installation, whereby in order to load the software for operation on a computer, the user has to signify acceptance of licence terms. In each case, provided the terms are legibly and clearly displayed and the user has the opportunity to read and review them before clicking, the practice is considered to be reliable. Many suppliers impose the requirement of clicking to accept both before downloading and at installation time.

[d] System Contracts. On occasion, computer hardware and software are provided together as a complete system. There may be one overall contract for the entire system, or there may be separate contracts, possibly bound together by a 'master' or 'umbrella' agreement. In any event, where all the elements are supplied from a single source and by or through a single supplier or contractor the commercial reality is that a single working system is sold. This certainly has implications of a practical nature, in terms of the drafting of the contract or contracts, and it may also have legal implications as well. There is some authority from Australian and Canadian cases that in such circumstances, at least where the software element is relatively small, the contract should be looked at as a whole and classified as a single contract for the sale of goods.ⁿ¹¹ In one English case where the point has been raised, the court refused to decide the issue, as it was not relevant to its judgment.ⁿ¹² In another,ⁿ¹³ the court appears to have assumed that the supply of a system comprising hardware and software should be treated as a sale of goods.

[e] Services Contracts. Services for the maintenance of hardware and operating and application software (separately or together, whether by the manufacturer or by a third party maintainer) now comprise a major segment of UK computing industry business. Bureau services, whereby specific functions such as payroll are offered by the service bureau at its own premises, are now supplemented (or replaced) by newer services. These include web hosting services, application service provider (ASP) services, disaster recovery facility services, network services contracts and facilities management services (also known as 'outsourcing' agreements), whereby the supplier provides (either on its own or on the customer's premises) the majority of the customer's information processing needs. Suppliers of such services are required to be licensed to maintain and to operate the relevant hardware, communications networks and software. In the most far reaching cases, such contracts will involve transfers of employees, land and/or other assets. Suppliers of facilities management services can be regarded as competitors by major software producers, some of which have on occasion signalled that they will defend their intellectual property rights from infringement.ⁿ¹⁴ The businesses of computer broking and leasing are to some extent dependent upon licences or, at the least, permission, from manufacturers to the brokers and lessors to refit and rebuild second hand machines (e.g. where access to, or copying of, microcode, or 'firmware', is required). Defence of core business and reclamation of peripheral business by hardware and software manufacturers are likely to be characteristic strategies in recessionary times. Parties seeking contractual arrangements which will allow them to offer computer services may have to call in aid the protection of competition laws. It appears that in analogous circumstances the Court of First Instance of the European Community will not permit

dominant suppliers (for example software houses) to refuse to supply their competitors with a copyright licence in respect of the technical information needed to ensure compatibility with the products of a dominant supplier.ⁿ¹⁵

[2] Intellectual Property

[a] Introduction. There has been a great deal of speculation, in every country of the western world, about the extent to which computer software is protected by existing laws relating to intellectual property. The debate has been restricted to software since no particular problems are created by computer hardware in itself. The position in England is described below.ⁿ¹⁶ It is worth noting that the micro computer revolution has made this aspect more rather than less important. When the nature of computing permitted all software to be supplied pursuant to a written agreement the supplier's protection (at least as against the customer if not third parties) rested mainly in the licence agreement itself. Further, access by third parties to the software was limited (at least, until the system was resold) and so the opportunity for illegal copying was small. With software sold 'over the counter' and now widely available for commercial distribution over the Internet, however, the software developer must rely much more upon the intellectual property rights he may, or may not, enjoy. In addition such hardware is widely distributed so that the opportunities for illegal copying, and indeed large scale piracy, are vastly increased. It is no wonder, therefore, that the great bulk of litigation in this area has tended to concern computer games and other mass produced software.ⁿ¹⁷

[b] Patents. Section 1(2) of the Patents Act 1977 provides that a computer program 'as such' is not an invention for the purposes of the Act, and therefore may not be patented. The simplicity of this provision is masked by the words 'as such' which would seem to leave open the possibility that a claim to a computer when programmed in a particular way, or to a method of conditioning a computer to operate in a particular way would be acceptable. This was the position under the 1949 Act and, it would seem, is still the law.ⁿ¹⁸

The situation regarding patentability of computer program inventions in Europe has been, to some degree, clarified by two recent European Patent Office ('EPO') Technical Board of Appeal decisions,ⁿ¹⁹ which have been reflected in the UK by the Comptroller of Patents' issuance of a Practice Note²⁰ stating that the UK Patent Office's practice will henceforth follow that of the EPO. The EPO decisions attempt to clarify the distinction between a computer program 'as such' and an invention implemented in a computer program which has a technical character and which exhibits a 'further technical effect.' This 'further technical effect' is taken to refer to an effect going beyond that of normal computer operations.

The position of the courts in the UK with respect to any patents granted following the EPO decisions and the Practice Note remains to be established, and may be affected by proposed EU legislation on computer-implemented inventions currently under consideration. The proposal for a directive on the patentability of computer-implemented inventionsⁿ²¹ is the subject of intense lobbying by proponents of a liberalised software patenting regime and by those opposed to software patenting. The outcome is as yet uncertain, although the general trend in Europe has been to follow the practice of the United States to some extent, in an attempt to maintain economic competitiveness for European concerns, while retaining continuity with European traditions in respect of the somewhat stricter technical requirements for patentability. The European Commission has also published a proposed directiveⁿ²² to provide an EU-wide system of utility model protection. The proposals include a shorter term (10 years) than a patent and less stringent requirements regarding novelty and inventive step.

[c] Copyright

[i] Copyright, Designs and Patents Act 1988 ('CDPA'). The CDPA represents a major realignment of UK copyright law in general, and of copyright protection of computer programs in particular. The CDPA, most of the provisions of which came into force on 1st August 1989ⁿ²³ replaces piecemeal legislation with an attempt to start again with a clean slate. On this slate are written both a restatement of the general principles of copyright, and also various sets of rules to deal with specific types of copyright work and their commercial exploitation. The preceding Copyright Act 1956, in its original form, contained no references to computers or computing. The CDPA provides that copyright

subsists in literary worksⁿ²⁴ and includes a 'computer program' as being within the term 'literary works.'ⁿ²⁵ This form of words has made it completely clear for the first time that programs are literary works and not merely to be protected as though they were literary works.ⁿ²⁶

The first owner of copyright in a work is usually the author of the work.ⁿ²⁷ This is the case regardless of whose ideas underlie the work and of who commissions or pays for the work. This general rule is, however, subject to several significant exceptions. Of wider importance is the special rule that, subject to contrary agreement, the first owner of copyright in a work created by an employee in the course of his or her employment is the employer, not the employee.ⁿ²⁸

Two additional provisions of the CDPA are especially of note. First, where a copy of a work in electronic form has been purchased on terms which allow the purchaser to copy or adapt the work in connection with his use of it, a person to whom the purchaser transfers the copy has the same rights in relation to copying or adaptation as the purchaser had, except to the extent that there are express terms excluding or limiting those rights, or the transfer of the copy.ⁿ²⁹ Second, the CDPA provides that where a literary, dramatic, musical or artistic work has been computer generated, the author is to be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.ⁿ³⁰

[ii] The Software Directive. The EC Council Directive on the Legal Protection of Computer Programs (known as 'the Software Directive')ⁿ³¹ was published in 1991, to harmonise the Member States' copyright laws in this field. Prior UK law, which was already well developed, substantially complied with most of the Directive's provisions. To enable UK law completely and unambiguously to comply with the Software Directive, various changes were made to some seven sections of the CDPA with effect from 1 January 1993, by means of the Copyright (Computer Programs) Regulations 1992.ⁿ³² These Regulations expressly address issues in the areas of implementing:

- a new, limited, right of decompilation;
- a right to make necessary back up copies; and
- a right to copy and adapt, including for error correction purposes.

The new decompilation rightⁿ³³ is limited to the obtaining by or on behalf of the licensed user of information which is necessary (and not otherwise obtainable, either supplied with the program, or available (perhaps even for a reasonable fee) from the right holder)) to achieve the 'interoperability' of the decompiled program with an independently created program; both decompilation and disassembly (each of which types of activity inherently involves making a copy or a translation of the original) are covered. It is stated to be an infringement subsequently to use or supply the interface information obtained through the decompilation or disassembly for any other objective, or in the development, production or marketing of any computer program which is found to be substantially similar to the original program.ⁿ³⁴ The right cannot be excluded by contract, except in the case of contracts which predate 1993.

Prior to the 1992 Regulations, the position as regarded back up copies was that in appropriate cases, in the absence of an express right in the licence, the courts would imply a right to make such copies. Now it is statedⁿ³⁵ that if taking the back up copy is necessary to the lawful use of the program, no infringement takes place through a lawful user of a program making an additional copy for back up purposes. (Software suppliers who offer to make a further copy available in the event of failure, or whose practice is to keep a back up copy for the licensee, may be able successfully to resist the licensee claiming entitlement under this provision to make a back up copy, by demonstrating that it is not in fact 'necessary' for the licensee to do so.) This right cannot be excluded by contract except for pre 1993 contracts.

Finally, lawful users of a program are now expressly permittedⁿ³⁶ to make a copy or an adaptation of the program, provided that this is (i) necessary for normal use, and (ii) not prohibited by the licence agreement. Note for this

exception that the copyright holder may by contract in effect withdraw the benefit of the new exception.

[iii] Protection Period. Following the introduction of Regulationsⁿ³⁷ to implement the EC Directive on the Term of Copyright,ⁿ³⁸ and subject to certain exceptions, copyright in a literary, dramatic, musical or artistic work or a filmⁿ³⁹ now lasts for seventy years from the end of the year in which the author dies.ⁿ⁴⁰ For a work of joint authorship, the fifty year period begins to run at the end of the year in which the last known author dies.ⁿ⁴¹ In the case of computer generated work, copyright expires after fifty years from the end of the year in which the work was made.ⁿ⁴² This latter rule is similar to the rules applying to sound recordings, films, broadcasts and cable programmes.ⁿ⁴³ The typographical arrangement of a published edition, which is itself a work for copyright purposes, is protected for a still shorter term of twenty five years from the end of the year of first publication.ⁿ⁴⁴ Thus, in the case of a product such as a software package comprising multiple works, copyright in the various component parts will (in all likelihood) run out on a number of different dates. Duration of copyright may depend, for example, on the life span of various human contributors, the year in which any computer generated works were made, and the year of first publication of the documentation.

[d] Database Protection. In March 1996 the European Parliament and Council issued a Directive to harmonise database copyright protection law throughout the European Community (known as the 'Database Directive'), which applies to the content of databases (but not to any computer programs used in the making or operation of databases accessible by electronic means).ⁿ⁴⁵ (This resulted from a 1992 European Commission proposal for a Council Directive). The 1996 Directive was to be implemented in national law by January 1, 1998. In the UK, the Directive was implemented by Regulationsⁿ⁴⁶ which came into force on that date. Previously, UK copyright law already provided copyright protection for databases, firstly, as compilations of materials, secondly, by protecting each component part which is copyright protectable and, thirdly, by protecting the software elements in databases as computer programs. The Database Directive has in effect added two further levels of protection, in the case of 'original' databases,ⁿ⁴⁷ by requiring Member States (a) to protect database content by copyright, and (b) to provide a right for the maker of such a qualifying database to prevent the extraction and/or re utilisation of the whole or or a substantial part (evaluated qualitatively and/or quantitatively) of the database contents. 'Extraction' is defined as the permanent or temporary transfer of all or part the contents of a database to another medium by any means or in any form; and 're utilisation,' in relation to any database contents, as the making available to the public of such contents by any means.ⁿ⁴⁸

The term of protection is fifteen years from the end of the calendar year in which the database was completed (or, if later) in which the database was made available to the public.ⁿ⁴⁹ There are detailed transitional provisions for databases created before January 1998.ⁿ⁵⁰

[e] Breach of Confidence. To the extent that the underlying materials have been kept secret or have only been disclosed or released subject to conditions of confidentiality by the copyright holder, a software licence can be analysed as amounting to a licence to use confidential information. As described elsewhere,ⁿ⁵¹ the law relating to trade secrets or breach of confidence in England is entirely a creature of the cases. In the South African case of *Northern Micro Computers v. Rosenstein*,ⁿ⁵² the Supreme Court of South Africa held it 'to be plain' that computer programs could be protected as trade secrets.ⁿ⁵³

Finally, it can be noted that a number of software package licence terms (and typically those emanating from North America) purport to apply trade secret protection to the contents of the package. This is hard to justify, especially where no source code is supplied to the licensee.

[3] Data Protection

[a] Data Protection Act 1984. This Act represented the culmination of about fifteen years of public discussion as to whether there should be legislation in the UK in the field of privacy generally, and in particular in relation to computers.ⁿ⁵⁴ It became fully operational in 1987.

The 1984 Act, which was concerned with personal data recorded for use on a computer, provided that data users and computer bureaux would be required to register with the Data Protection Registrar,ⁿ⁵⁵ and to comply with certain 'data protection principles' laid down in the Act.ⁿ⁵⁶ Once registered, a person was not to hold personal data other than as registered, nor hold or use it for any purpose, obtain it from any source, disclose it to any person, or transfer it to any country, not described or named in the entry.ⁿ⁵⁷ Certain special provisions applied specifically to computer bureaux.ⁿ⁵⁸ Generally, 'data subjects' -- living individuals to whom personal data relate -- had the right to inspect the register,ⁿ⁵⁹ to be informed by a data user whether he held any personal data relating to them and to be supplied with a copy.ⁿ⁶⁰ Data subjects also became entitled to compensation from data users for loss suffered as a result of inaccurate data being held, or arising from the loss or destruction of or unauthorised access to or disclosure of personal data.ⁿ⁶¹ Registration of existing data bases commenced on 11th November 1985; the unregistered holding of personal data had been prohibited since 11th May 1986; and the right of data subjects to inspect the register commenced on 11th November 1987.ⁿ⁶²

[b] Data Protection Directive and the Data Protection Act 1998 ('DPA'). The 1984 Act was repealed by the DPA, by which the UK implemented the requirements of the EU Parliament and Council Data Protection Directive.ⁿ⁶³ The 1998 Act introduced a number of significant changes in UK data protection law, including the following:

- certain manual files are now caught for the first time by the regime
- an absolute prohibition on all processing was introduced, unless the data controller's activities fall within certain specified conditions for the processing of personal data or of sensitive data
- where a data controller acquires data from a third party, the subject is entitled to receive an information notice
- a simpler notification procedure replaced the registration procedure
- wider rights of access to their data for individuals
- wider rights for individuals to object to processing of their information
- prohibition of data transfers outside the EEA, except to countries which provide an adequate level of protection.

Although the 1998 Act received the Royal Assent in July 1998, its substantive provisions required delegated legislation before being implemented. Prior to the issuing of the relevant Regulations, the Home Office engaged in a process of consultation and issued two consultation papers, as well as drafts of the various proposed individual Statutory Instruments for review. About 20 such Instruments were required fully to implement the 1998 Act.

Since the coming into force of the DPA and the Freedom of Information Act 2000,ⁿ⁶⁴

the former Data Protection Registrar is known as the Information Commissioner. Data controllers are subject to direct obligations under the data protection regime; and (unless specifically exempted) they are also obliged, before they can process personal data, to notify key details of their processing to the Commissioner, who will compile a register, open to public scrutiny.

A separate distinctive feature of the new regime, reflecting the requirements of Article 20 of the Directive, is that data controllers who notify their intention to carry out certain processing are required to wait (usually for 28 days) in order to allow the Commissioner to make a preliminary assessment of the likely compliance of the relevant processing with the new requirements.

The DPA 98 seeks to balance the rights of individuals and the sometimes competing interests of those with legitimate reasons for using personal information. It gives individuals certain rights regarding information held about them, and places obligations on those who process information (data controllers) while giving rights to those who are the subject of that data (data subjects). 'Personal information' covers both facts and opinions about a specific living individual.

Anyone processing personal information must register (or 'notify') the Information Commissioner's Office that they are doing so, unless their processing is 'exempt'. Notification costs 35 per annum.

Any person or business processing personal information must comply with eight enforceable principles of good information handling practice, which state that data must be:

1. fairly and lawfully processed,
2. processed for limited purposes,
3. adequate, relevant and not excessive,
4. accurate and up to date,
5. not kept longer than necessary,
6. processed in accordance with the individual's rights,
7. secure, and
8. not transferred to any country outside the European Economic Area, unless that country has adequate protection for the individual.

At least one of the following six conditions must be met for any processing of personal information to be considered 'fair':

1. the individual has consented to the processing,
2. the processing is necessary for the performance of a contract with the individual,
3. the processing is required under a legal obligation (other than one imposed by the contract),
4. the processing is necessary to protect the vital interests of the individual,
5. the processing is necessary to carry out public functions, e.g. the administration of justice, or
6. the processing is necessary in order to pursue the legitimate interests of the data controller or third parties (unless it could unjustifiably prejudice the interests of the individual).

Specific provision is made under the DPA for processing 'sensitive personal information,' a term which includes information concerning an individual's racial or ethnic origin, political opinions, religious or other beliefs, trade union membership, physical or mental health condition, sex life, criminal proceedings or criminal convictions. For any such sensitive personal information to be considered 'fairly' processed, at least one of several additional conditions must be met. These include:

- having the explicit consent of the individual,
- being required by law to process the information for employment purposes,
- needing to process the information in order to protect the vital interests of the individual or another person, and
- dealing with the administration of justice or legal proceedings.

There are seven rights under the DPA:

1. The right to subject access. This allows individuals to find out what information is held about them on computer and within some manual records.
2. The right to prevent processing. Any individual can ask a data controller not to process information relating to him or her that causes substantial unwarranted damage or distress to them or anyone else.
3. The right to prevent processing for direct marketing. Any individual can ask a data controller not to process information relating to him or her for direct marketing purposes.
4. Rights in relation to automated decision-taking. Individuals have a right to object to decisions made only by automatic means e.g. there is no human involvement.
5. The right to compensation. An individual can claim compensation from a data controller for damage and distress caused by any breach of the DPA. Compensation for distress alone can only be claimed in limited circumstances.
6. The right to rectification, blocking, erasure and destruction. Individuals can apply to the court to order a data controller to rectify, block or destroy personal details if they are inaccurate or contain expressions of opinion based on inaccurate information.
7. The right to ask the Commissioner to assess whether the provisions of the DPA have been contravened. Any individual who believes his or her personal information has not been processed in accordance with the DPA can ask the Commissioner to make an assessment. If the provisions of the DPA are found to have been breached and the matter cannot be settled informally, then an enforcement notice may be served on the data controller in question.

Criminal offences: a number of criminal offences are created by the DPA, including:

- Notification offences. It is an offence for a data controller who has not notified the Commissioner either of the processing being undertaken or of any changes that have been made to that processing as previously notified to process personal data;

Procuring offences. It is an offence knowingly or recklessly to obtain, disclose or procure the disclosure of personal information without the consent of the data controller. This is subject to exceptions (e.g. where such obtaining or disclosure was necessary for crime prevention/detection.)

Selling offences. If a person has obtained personal information illegally, it is an offence for him or her to offer or to sell that personal information.

The role of the Information Commissioner's Office: the Information Commissioner's Office has specific responsibilities for the promotion and enforcement of the DPA. Under the DPA, the Commissioner may:

- serve information notices requiring data controllers to supply him with the information he needs to assess compliance; and
- where there has been a breach, serve an enforcement notice (which requires data controllers to take specified steps, or to stop taking steps, in order to comply with the law).

Appeals against these notices may be made to the Information Tribunal. *Additional Information:* additional guidance on the DPA is available on the Information Commissioner's Office website at <http://www.informationcommissioner.gov.uk>. The Information Commissioner's Office has also provided a telephone helpline.

[c] Telecommunications Data Protection Directive. In December 1997 the European Parliament and Council issued a Directive,ⁿ⁶⁵ intended to particularise and to complement the provisions of the Data Protection Directive 95/46. Specific areas covered include traffic and billing data, itemised billing, directories of subscribers and unsolicited calls. Some of the provisions of this Directive extend not only to natural persons but also to legal entities. The Directive applies in the area of publicly available telecommunications services, and is primarily concerned with digital exchanges. Specific attention is paid to: the ability to withhold the presentation of calling or called line identification; the right to be excluded from a public directory of subscribers; and provisions relating to unsolicited direct marketing calls and faxes.

The UK's implementing Regulations came into force at the same time as those implementing the DPA, although the provisions relating to unsolicited direct marketing calls and faxes have been in effect since May 1, 1999 under earlier Regulations issued in 1998.ⁿ⁶⁶

[d] Directive on Privacy and Electronic Communications. ('DPEC')

As part of the European Commission's 1999 review of the communications framework, a draft proposal to update the existing Telecoms Data Protection Directive (97/66/EC) was adopted on 12 July 2000, formerly known as the Communications Data Protection Directive but now known as the Directive on Privacy and Electronic Communications ('DPEC'). On the 30 May 2002 the European Parliament voted to accept a compromise text, opening the way for formal adoption of the DPEC on 12 July 2002. The DPEC is one of the measures that arose from the European Commission's 1999 Review of the regulatory framework for electronic communications. Other key elements of the Review package include the Framework Directive (2002/21/EC), the Access Directive (2002/19/EC), the Authorisation Directive (2002/20/EC) and the Universal Service Directive (2002/22/EC), implemented in the UK via the Communications Act 2003.

The DPEC was adopted on 12 July 2002 and makes a number of changes, in the light of technological developments, to the current Directive (97/66/EC) concerning the processing of personal data and the protection of privacy in the telecommunications sector. The overriding aim of the new Directive is to take account of technological changes and to make the provisions as technology-neutral as possible. The new Directive replaces existing definitions for telecommunications networks and services with new definitions for electronic communications networks and services. These changes are intended to ensure technological neutrality and interoperability among networks and systems in order to facilitate the provision of a wide range of electronic communications services and guarantee the maximum level of consumers' personal data and privacy protection.

In particular, the new Directive enables the provision of value added services based on location and traffic data, subject to the consent of subscribers. It removes the possibility of a subscriber being charged for exercising the right not to

appear in public directories. It introduces also new information and consent requirements on entries in publicly available directories, including a requirement that subscribers are informed of all the usage possibilities of publicly available directories (e.g. reverse searching from a telephone number in order to obtain a name and address). In addition, the DPEC clarifies the position of e-mail and use of the internet, and extends controls on unsolicited direct marketing to all forms of electronic communications including unsolicited commercial e-mail (UCE or Spam) and SMS to mobile telephones. Finally, it allows Member States to introduce provisions on the retention of traffic and location data for law enforcement purposes and it introduces controls on the use of cookies on websites.

The final Directive (the DPEC), was adopted on 12 July 2002 and required implementation in Member States by 31 October 2003. Following a public consultation exercise on how to implement the DPEC in the UK which was launched on 27 March 2003 and ran for 12 weeks (closing on 19 June 2003) final implementing Regulations⁶⁷ were prepared by the DTI, taking into account the responses received, and laid before Parliament on 18 September 2003; they came into force on 11 December 2003. The final text of the Regulations is available on the HMSO Website.

The new Directive:

replaces existing definitions for telecommunications services and networks with new definitions for electronic communications and services to ensure technological neutrality and clarify the position of e-mail and use of the internet;

permits the provision of value added services based on location and traffic data, subject to the consent of subscribers (for example, location-based advertising to mobile phone users);

removes the possibility of a subscriber being charged for exercising the right not to appear in public directories;

introduces new information and consent requirements on entries in publicly available directories, including a requirement that subscribers be informed of all the usage possibilities of publicly available directories e.g. reverse searching from a telephone number in order to obtain a name and address;

extends controls on unsolicited direct marketing to all forms of electronic communications including unsolicited commercial e-mail ('UCE' or 'spam') and SMS to mobile telephones; UCE and SMS will be subject to a prior consent requirement, so that the receiver is required to agree to it in advance, except in the context of an existing customer relationship, where companies may continue to email or SMS to market their own similar products on an 'opt-out' basis;

specifies that Member States may introduce provisions on the retention of traffic and location data for law enforcement purposes;

introduces controls on the use of 'cookies' on websites. Cookies and similar tracking devices will be subject to a new transparency requirement - anyone who employs these kinds of devices must provide information on them and allow subscribers or users to refuse to accept them if they wish.

Guidance notes on the new provisions have been prepared by the Information Commissioner - the enforcer of the new Regulations. It is available on the Information Commissioner's Office website on their electronic communications guidance pages. The Interactive Advertising Bureau (IAB) provides independent guidance for internet users and online operators on the use of cookies and how to notify users of them under the new rules at: <http://www.allaboutcookies.org>.

[4] Crime

Computers, like other human artefacts, may be the objects or the means of crime and there are UK criminal laws concerned with such matters (e.g. theft, fraud, blackmail, etc.). In August 1990 the Computer Misuse Act came into force, and designated three computer related activities as criminal: firstly, unauthorised access to computer material (widely defined to encompass 'hacking'), secondly, unauthorised access with intent to commit or facilitate the commission of further offences, and, thirdly, the unauthorised modification of computer materials (intended to discourage such data corruption techniques as viruses). The Computer Misuse Act also clarified (with reference to computers) the Criminal Damage Act 1971, so that it does not apply to mere damage to data, unless the computer's, or the storage medium's, physical condition is thereby impaired. Following the publication in June 2004 of a report by an all-party Internet Group of MPs, a Bill was published in March 2005 to amend the Computer Misuse Act 1990 by criminalising 'denial-of-service' attacks on websites and internet service providers ('ISPs').

FOOTNOTES:

(n1)Footnote 1. For such guidance see R. Morgan and G. Stedman, *Computer Contracts* (4th Edition, 1991); David Strang, Chapter 6 'Contracts' *Encyclopedia of Information Technology Law* (looseleaf); C. Reed & J. Angel, *Computer Law* (5th Ed, 2003).

(n2)Footnote 2. Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act, 1994) ss.10 15.

(n3)Footnote 3. Supply of Goods and Services Act 1982 ss. 2 5 (as amended by the Sale and Supply of Goods Act, 1994) (work and materials) and ss.7 10 (hire). Note that the Supply of Goods and Services Act 1982 does not apply in Scotland.

(n4)Footnote 4. In, e.g., *Eurodynamics Systems Plc v. General Automation Ltd* (unrep.) (QBD) 6 September 1988, LEXIS (systems software) or in *Saphena Computing Ltd v. Allied Collection Agencies Ltd*, (unrep.) Q.B.D Official Referees's Court, 22 July 1988 (*see* (1988) 59 *Computers & Law*, 20); (unrep.) C.A. 3 May, 1989 (*see* (1989) 61 *Computers & Law*, 23), LEXIS (applications software).

In an obiter comment, Scott Baker J. indicated that 'software probably is goods within the [Sale of Goods] Act'-*The Times*, November 11, 1994, BD. But in the case of *St Albans City & District Council v. International Computers Ltd. [1996] TLR 500* (CA), it was held that because the customer only received a mere licence to use the specially developed software developed by the supplier, the software was not 'goods'.

(n5)Footnote 5. In Scotland, *see* Unfair Contract Terms Act 1977 ss.15(2)(a) and 21.

(n6)Footnote 6. In a consumer transaction, terms purporting to exclude implied obligations as to quality will be wholly ineffective: s.7(2). In other cases such terms will only be effective so far as the term in question satisfies the 'requirement of reasonableness': s.7(3). Terms purporting to exclude implied obligations as to title will only be effective insofar as the 'requirement of reasonableness' is satisfied: s.7(4).

(n7)Footnote 7. These sections deal with the exclusion of negligence liability (s.2) and certain liabilities arising in contract (s.3), and the enforceability of certain indemnities given by consumers (s.4).

(n8)Footnote 8. Paragraph 1(c) does not apply in Scotland. The equivalent Scottish provision is found in s.15 which brings within the ambit of ss.16 18 (equivalent to the English ss.2 4) any contract but only to the extent that the contract '(a) relates to the transfer of ... possession of goods ... [or] (c) relates to services of whatever kind ...'. Insofar as a software licence relates to (a) or (c) the sections would seem to apply.

(n9)Footnote 9. *See e.g.*, C. Tapper, *Computer Law* (4th Edition, 1989) p.202; supported in the Official Referee's decision in *Salvage Association v. CAP Financial Services Ltd.*, [1995] *F.S.R.* 654.

(n10)Footnote 10. *See* C.J. Millard, *Shrink wrap Licensing*, 4 *Computer Law & Practice* (1987) p.8. In *Beta Computers (Europe) Ltd. v. Adobe Systems (Europe) Ltd.*, the Scottish Court of Session held that a supply of packaged

software under shrink wrap terms was not a sale, but was a contract 'sui generis'.

(n11)Footnote 11. In *Toby Constructions Products Pty Ltd. v. Computa Bar (Sales) Pty Ltd.* (1983) 2 NSWLR 48, 50 ALR 684, the Supreme Court of New South Wales found that a contract for the supply of computer hardware and software and of training services was a contract for the sale of goods. In that case it seems that there was a single contract providing for the sale of both elements. The software concerned was a business management package and a word processing package. Rogers J. said (at 51) that '[a]t the end of the day what weighs with me is that the system, software included, whilst representing the fruits of much research and work, was in the current jargon off the shelf, in a sense mass produced'. See also *Burroughs Business Machines Ltd. v. Feed Rite Mills (1962) Ltd.* (1973) 42 DLR (3d) 303 (Manitoba Ct. App).

(n12)Footnote 12. *Eurodynamics Systems plc v. General Automation Ltd.* (unreported) 6 September 1988, LEXIS.

(n13)Footnote 13. *Micron Computer Systems Ltd v. Wang (UK) Ltd.*, (unrep.) QBD, 9 May 1990.

(n14)Footnote 14. On 8 October 1990 CA Management Inc. (Computer Associates) sought injunctive relief against Hoskyns Group plc, alleging that Hoskyns, in supplying facilities management services, had infringed copyright in 37 computer programs. *Legal Business Magazine* April 1991, p.50.

In January 1994, it was reported that the DVLA (the UK Driver and Vehicle Licensing Agency) had been ordered by the High Court no longer to use certain Computer Associates software products, following the award of an outsourcing contract to EDS. The transfer, at no charge to the DVLA, of the right to use this software to EDS was not permitted by the terms of the CA licensing arrangements.

(n15)Footnote 15. *BBC and BBC Enterprises Limited/ITP/RTE v. Commission* Cases T 69/89, T 70/89 and T 76/89, 10 July 1991, 4 CMLR (1991) pp. 586, 669, 745, confirmed by the European Court of Justice on 6 April 1995, C241/91 and C242/91; see further Section 47.04[3] *infra*.

(n16)Footnote 16. For more detailed treatments, see e.g. C. Millard, *Legal Protection of Computer Programs and Data* (1985); C. Tapper, *Computer Law*, n.8 *supra*; B. Niblett, *Legal Protection of Computer Programs* (1980); and H. Brett and L. Perry (ed), *The Legal Protection of Computer Software* (1981).

(n17)Footnote 17. Another explanation for the correlation between the high proportion of litigation brought and the markets for computer games lies in the 'fashion' nature of many such programs. A successful application for an injunction has the effect in many cases of crippling the chances of the defendant's program during the only period when it could achieve market success; by the time the injunction is lifted, other kinds of programs will then be more fashionable.

(n18)Footnote 18. See *Re Gale's Application*, [1991] RPC 305, IPD 14039; see *Gevers' Application* [1970] RPC 91; *Burroughs' Application* [1974] RPC 147; and *IBM Corporation's Application* [1980] FSR 564. The authors of *Terrell on the Law of Patents* (13th Edition, 1982) submit, after discussing the foregoing cases, that 'the old line of authority should be followed': at para. 2.52. This view is supported by the decision of Falconer, J. in *Merrill, Lynch's Application* [1988] RPC 1 who, obiter, confirmed that a claim directed towards the practical effect of a computer programmed in a particular way, where such effect is novel and inventive, will be patentable. See also *Vicom System Inc's Application* (O.J. (EPO) 1/1987 p.14); [1987] 2 EPO 74.

(n19)Footnote 19. T 935/97, IBM/Computer programs [1999] EPOR 301; and T 1173/97, IBM/Computer program product OJEPO 1999, 609, [2000] EPOR 219.

(n20)Footnote 20. Patent Office Practice Note" [1999] RPC 563.

(n21)Footnote 21. Proposal for a Directive of the European Parliament and Council on the patentability of

computer-implemented inventions, COM (92) 2002 final.

(n22)Footnote 22. Amended proposal for a European Parliament and Council Directive approximating the legal arrangements for the protection of inventions by utility model, COM (99) 0309 final.

(n23)Footnote 23. Copyright, Designs and Patents Act 1988 (Commencement No.1) Order 1989 (S.I. 1989 No.816) (C.21).

(n24)Footnote 24. CDPA s.1(a).

(n25)Footnote 25. *Id.* s.3(1)(b); but note that 'computer program' is not defined.

(n26)Footnote 26. As was the case under the 1956 Act, as amended by the Copyright (Computer Software) Amendment Act 1985 s.1.

(n27)Footnote 27. CDPA s.11(1).

(n28)Footnote 28. *Id.* s.11(2). The other exceptions to the rule related to Crown and Parliamentary copyright, and the copyright of certain international organisations: s.11(3).

(n29)Footnote 29. *Id.* s.56.

(n30)Footnote 30. *Id.* s.9(3).

(n31)Footnote 31. 91/250/EEC, 14 May 1991 (OJ No.L122/42, 17.5.1991).

(n32)Footnote 32. S.I.1992 No.3233.

(n33)Footnote 33. CDPA s.50B(1).

(n34)Footnote 34. CDPA s.50B(2).

(n35)Footnote 35. CDPA s.50A.

(n36)Footnote 36. CDPA s.50C.

(n37)Footnote 37. Duration of Copyright and Rights in Performances Regulations, 1995, (S.I. 1995 No. 3297)

(n38)Footnote 38. Directive 93/98 harmonising the Term of Protection of Copyright and Certain Related Rights, O.J. 1993 L290/9.

(n39)Footnote 39. In the case of a film, the period is measured from the death of the last to die of the persons connected with the film (e.g., director, author, composer).

(n40)Footnote 40. CDPA s.12(1), as amended (the term was previously life plus 50 years, except in the case of films).

(n41)Footnote 41. *Id.* s.12(4).

(n42)Footnote 42. *Id.* s.12(3).

(n43)Footnote 43. *Id.* ss.13 and 14.

(n44)Footnote 44. *Id.* s.15.

(n45)Footnote 45. Directive 96/9, [1996] O.J. L77/20.

(n46)Footnote 46. Copyright and Rights in Databases Regulations, 1997 (S.I. 1997 No. 3032).

(n47)Footnote 47. *I.e.*, a collection of independent works, data, or other materials which (i) are arranged in a systematic or methodical way; (ii) are individually accessible by electronic or other means; and (iii) by reason of the selection or arrangement of the contents, can be seen as an intellectual creation of the author.

(n48)Footnote 48. Article 7 of the Directive; Regulations 16 and 12 of the UK Regulations.

(n49)Footnote 49. Article 10 of Directive 96/9.

(n50)Footnote 50. Regulations 26 30 inc. of the UK Regulations, (*see* n.31.1 *supra*).

(n51)Footnote 51. *See* Section 13.08 *supra*.

(n52)Footnote 52. [1982] FSR 124.

(n53)Footnote 53. *Id at 138. See also* Format Communications Mfg. Ltd. v. ITT (United Kingdom) Ltd., [1983] FSR 473 (C.A.), in which it was assumed that the source code listing for a message switching system could constitute confidential trade secrets.

(n54)Footnote 54. *See* Report of the Committee on Privacy (1972, Cmnd 5012); *Computers and Privacy* (1975, Cmnd 6353); *Computers: Safeguards for Privacy* (1975, Cmnd 6354); the *Report of the Data Protection Committee* (1978, Cmnd 7341); and *Data Protection --The Government's Proposals for Legislation* (1982, Cmnd 8539).

(n55)Footnote 55. S.5(1).

(n56)Footnote 56. The principles are set out in Part I of Schedule 1 to the Act, and are to be interpreted in accordance with the provisions of Part II of that Schedule. In the event of failure to comply with any of the principles, the Registrar can serve an enforcement notice on a registered person: s.10.

(n57)Footnote 57. S.5(2).

(n58)Footnote 58. *See, e.g.* s.15.

(n59)Footnote 59. S. 9; all members of the public were granted the right to inspect the register.

(n60)Footnote 60. S.21(1).

(n61)Footnote 61. Ss.22 and 23.

(n62)Footnote 62. Data Protection Act 1984 (Appointed Day) Order 1985, S.I. 1985 No. 1055.

(n63)Footnote 63. Directive 95/46/EC on the 'Protection of Individuals with Regard to Processing of Personal Data and on the Free Movement of such Data' [1995] O.J. L281/31.

(n64)Footnote 64. Freedom of Information Act 2000, Sch.2 para.1(1).

(n65)Footnote 65. Directive 97/66/EC concerning the 'Processing of Personal Data and the Protection of Privacy in the Telecommunications Sector,' O.J. [1997] L24.

(n66)Footnote 66. Telecommunications (Data Protection and Privacy) (Direct Marketing) Regulations, 1998 (S.I. 1998/3170).

(n67)Footnote 67. Privacy and Electronic Communications (EC Directive) Regulations 2003, S.I. 2003 No. 2426.