2008-

"Some notes on IT Law"

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The disclaimer

Although qualified in law, I am not licensed to give legal advice so if you are in any doubt whatsoever, you must consult a qualified legal practitioner for any definitive advice. Nothing I say here should be construed as having any legal weight and is intended for the purposes of informal discussion only.

Some useful references

British Computer Society, (2000) "Intellectual Property Rights in Software", ISBN 1-902505-18-2

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Kaner, C. and Pels, D. (1998) "Bad software", Wiley, New York, ISBN 0-471-31826-4

Lloyd, I.J. (1997) "Information Technology Law", Butterworths, London, ISBN 0-406-89515-5

Phillips, J. and Firth, A. (1995) "Introduction to Intellectual Property Law", Butterworths, London, ISBN 0-406-04515-5

Reed, C (ed) (1996), "Computer Law", Blackstone, London, 3rd edition ISBN 1-85431-448-3

Types of Law

- **Case Law**
  - England and Wales, many Commonwealth countries and the USA
- **Civil (Roman) law**
  - Scotland, many European countries

Although different in emphasis, the two systems have converged to a large extent by means of standard formulae (statutes)

Structure of seminar

    v **<u>Criminal Law and Computer Misuse</u>**

    v **Contract and Tort**

    v **Intellectual Property Rights**

    v **Data Protection**

Criminal Law and Computer Misuse

- v **Criminal law is dealt with effectively by a different system than civil law**
- v **Criminal law can include jail sentences**

Criminal Law and Computer Misuse

Computer Misuse Act (1990) (CMA90) (Wilson, 2002)

- v **Illegal access: section 1 of CMA90**
- v **Illegal interception: Section 44 of the Telecommunications Act 1984 on intentional modification of messages on a public telecoms system**
- v **Data interference: Section 3 of CMA90**
- v **Systems interference: Section 3 of CMA90; Terrorism Act 2000**
- v **Misuse of devices: Section 42A of Telecoms Act 1984**
- v **Computer-related forgery: No UK offence for entering unauthorised data**
- v **Computer-related fraud: No fraud offence although it can be treated under Theft Act 1968 and section 2 of CMA90**
- v **Child pornography: Obscene Publications Act**
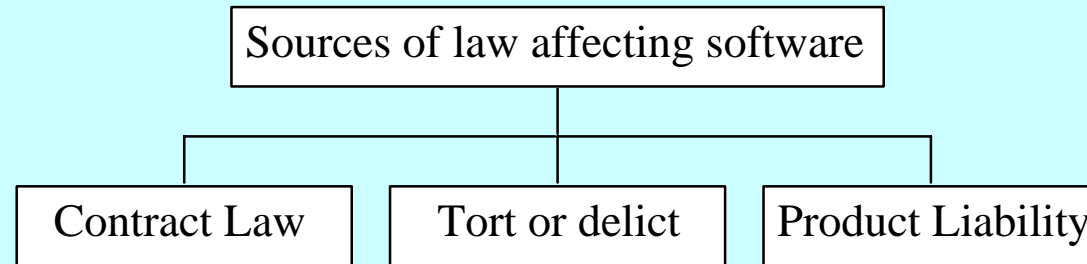- v **Copyright infringement: Copyright, Designs and Patents Act, 1988**

Structure of seminar

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- v **<u>Contract and Tort</u>**
- v **Intellectual Property Rights**
- v **Data Protection**

How many ways can I sue thee ?

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              ┌──────────────────────────────────┐
              │ Sources of law affecting software │
              └──────────────────────────────────┘
                              │
        ┌─────────────────────┼─────────────────────┐
  ┌──────────────┐    ┌──────────────┐    ┌──────────────────┐
  │ Contract Law │    │ Tort or delict│    │ Product Liability│
  └──────────────┘    └──────────────┘    └──────────────────┘
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v **Civil Law**

- – Law of Contract
- – Law of Tort (negligence) (Delict in Scotland)
- – Product Liability (Consumer Protection Act)

Contract

v **Law of Contract**

 – Effectively the only avenue currently used by the courts based on a few influential cases

  u Saphena v. Allied Collection Agencies (1985)

  u St Alban's City Council v ICL (1996)

 – Is software goods or a service ?

  u Different legal regimes (Sale of Goods Act) or (Supply of Goods and Services Act)

 – Contracts should allow for failure and mitigate accordingly

Contract

v **Relevant statutes**

- Goods
    - u Sale of Goods Act, 1979, (SGA79)
    - u Sale and Supply of Goods Act, 1994, (SSGA94)
- Services
    - u Supply of Goods and Services Act, 1982, (SGSA82)
- Unfair Contract Terms Act, 1977, (UCTA77)

Contract

v **Goods v. Services**

– Goods

  u Subject to implied terms of title, description and so on.

  – "Merchantable quality" in SGA79

  – *"meet the standard a reasonable person would regard as satisfactory"* and "freedom from minor defect" in SSGA94. (cf extended warranties)
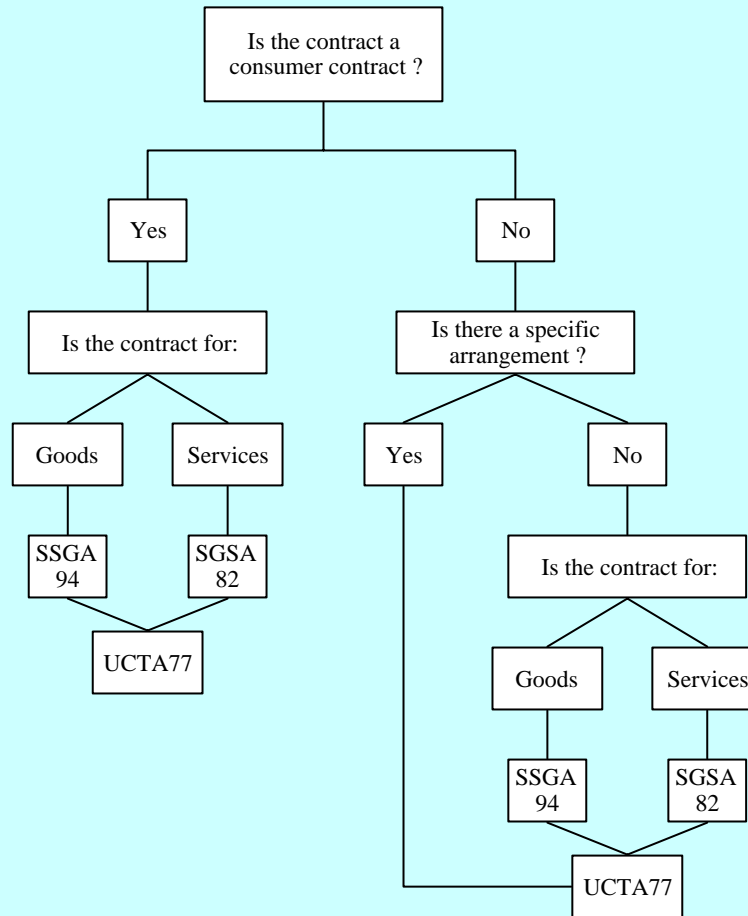
– Services

  u "reasonable care and skill" in SGS82.

Categorising software as goods is more stringent than categorising it as services

(Note: knock-on peculiarities with VAT)

Goods or Services ?

Is the contract a consumer contract ?

- Yes
  - Is the contract for:
    - Goods
      - SSGA 94
    - Services
      - SGSA 82
    - UCTA77
- No
  - Is there a specific arrangement ?
    - Yes
      - UCTA77
    - No
      - Is the contract for:
        - Goods
          - SSGA 94
        - Services
          - SGSA 82
        - UCTA77

Contract

v **Some notes**

    – Dealing with broken agreements

        u Software contracts should allow for graceful handling of failure in some part of the deliverable. Some kind of failure in software contracts is the rule not the exception.

    – Escrow

        u Access to source code for a customer in the event of business failure.

Negligence

v **Law of Tort (negligence)**

– Onus is on plaintiff to prove negligence – non-strict liability.

– Standard tests

  u Is there a duty to take care (proximity)

  u Standard of care

  u Did the defect cause the damage ?

  u Could the ordinary man have foreseen the damage ?

  u Is there a special relationship ?

  u Physical loss v. economic loss – the role of policy

Negligence

v **Product liability (Consumer Protection Act 1987)**

- Strict liability (unlike Tort)
- Relationship of software with the Act is not very clear
- Covers damage to person or property only
- Defines a product as "goods or electricity" whatever this is supposed to mean. (Never let lawyers loose on scientific principles)

Structure of seminar

v **Criminal Law and Computer Misuse**

v **Contract and Tort**

v <u>**Intellectual Property Rights**</u>

v **Data Protection**

Intellectual Property Rights

These cover:-

ᵛ **Copyright**
  – Persists in all types of software
  – Restrictions on copying very awkward for software

ᵛ **Patents**
  – You can't patent software, algorithms … because they are not considered inventions
  – Expensive, often phenomenally.

ᵛ **Trade Marks**
  – Registered (don't need to prove copyright) or unregistered

ᵛ **Design Rights**

ᵛ **Confidential information**

Intellectual Property Rights

Who owns the program I create ?

v   In general, its yours unless you produced it under a contract of employment in which case its your employer's

v   This is not necessarily straightforward, (shared with others, uses bits of other programs, …)

Intellectual Property Rights

Database protection

v Copyright is only available to protect database compilations which are their author's own intellectual creation

v The *sui generis* rule of the EEA Database Directive is only available to protect the contents of databases if the maker can demonstrate that there has been a substantial investment in obtaining, verifying or presenting those contents.

Intellectual Property Rights

Decompilation or reverse engineering

ᵥ Permitted under special conditions only

    – **The licence allows it**

    – **If carried out for interoperability**

ᵥ This can only be done by a licensee and the information must not be shared with third parties.

Intellectual Property Rights

Preventing employees distributing software

ᵥ Include provision forbidding this in employee contract making it clear that it's a serious disciplinary offence

ᵥ Restrict access to original distribution media (not very easy nowadays) and restrict access to CD/DVD writers (ditto)

ᵥ Monitor your employee e-mail

ᵥ Use licence enforcement software, Flex, Sentinel …

Intellectual Property Rights

Licensing software from third parties

Make sure …

- The supplier warrants that they own the copyright and other IPRs, (can be a nightmare)
- The supplier warrants that your use of the software does not infringe the rights of any other third party
- The supplier indemnifies you against claims from third parties for IPR or infringement.
- Check the legal regime and arbitration details for the contract, (it may not be much use to you if it is written under the laws of Burkina Faso).

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The Data Protection Act, 1998

This has been made a real meal of in the UK

- Note
  - ᵤ Its very complex (86 pages)
  - ᵤ **Personal data** means:-
    - data which relate to a living individual who can be identified solely from those data or in conjunction with other data a data controller might acquire

    AND

    - Includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual
  - ᵤ **Sensitive personal data** is personal data relating to racial or ethnic origin, political opinions, religious belief, membership of Trade Unions, physical or mental health, sex life, the commission or alleged commission of offences or details of any proceedings concerning those offences.

Where to get statutes

Office of Public Sector Information:

http://www.opsi.gov.uk/legislation/uk.htm