

Licensing Computer Software

Many pitfalls await unwary practitioner in U.K. and elsewhere when it comes to computers

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I am sure that many of you have already found yourselves asked to advise your companies in respect of a contract relating to the purchaser and installation of a computer. If you have not been asked, the time cannot be far off when you will be, or perhaps I should say *should* be. On the other hand, the first you may hear of your company's computer may be when you are asked to advise in connection with a dispute because it is not working and your company is wishing to seek a remedy for the failure.

78 The reason that this is the first that you have heard of your company's computer is because no advice was sought at the time the computer was ordered or installed. The man who suggested that a lawyer should be asked to run his eye over the contract was told to go see a psychiatrist — "for God's sake don't bring the lawyers in, they'll simply sour relations all round and delay everything — in fact put us right back to square one."

Now — of course — they are asking you, the lawyer, to do just that, put them right back to square one. You look at the contract and you quickly realize, and have to tell your colleagues that the only way you could even write a stiff letter to the supplier is by using parchment.

Most people and organizations go to considerable lengths to prevent the outbreak of fire and to protect themselves and their property against the consequences of such an outbreak should it occur, or indeed of other natural phenomena otherwise often called "acts of God." Why? Because, presumably, they realize that if they become victims of such hazards their business may come to a standstill and their livelihood may quickly be destroyed. And yet should misfortune so strike — irrespective of such precautions as may have been taken privately — there are public services such as the fire service, the police and even the army, who may, in appropriate circumstances, be called upon to help.

Few people, it seems, have yet come to appreciate that, as computers come to perform increasingly critical functions, relatively minor failures can bring with them serious adverse consequences and major break-

downs can bring a business to its knees. Yet, when the computer stops, there are no public services to be called upon. When the computer stops and the production line grinds to a halt, therefore, we are on our own, or are we? That will, maybe, depend upon how well the installation and supporting contracts have been drawn up.

Long Process

The move into computerization is usually a long process. Unlike the purchase of a motor car, a typewriter or a photocopying machine, the introduction of the computer will usually, and indeed should, involve months of preparatory work. The purchase of the computer itself (the hardware) and even the programs (the software) are incidental matters in the overall scheme of things. They may represent the beginning of a new era for a business but they also represent the end of a long process of planning and preparation.

If the computer, once installed, fails to achieve what it was intended or expected to, questions will be asked, and the customer will seek to lay blame. Invariably, the failure of the computer to perform properly will be due either to the fact that it is the wrong type of machine — it may quickly prove to be too small or too slow to cope with the workload — or, perhaps more important, it may transpire that the system overall incorporates faults or inadequacies in design. The software may be ill-conceived or simply embody faults or "bugs." If problems of this nature arise, who is to blame? What are the customer's remedies?

It is often at this stage only that the lawyer is consulted. The initial discussion with the client will quickly reveal that many months before the computer arrived on the premises, the client engaged the services of a consultant to advise him how to organize his business. The consultant will have advised the client that he needed a computer. The client will have accepted that advice, and, himself having no idea or concept as to how he could make use of a computer, and certainly having no idea as to what sort of computer he would need, he will then have told the consultant to go ahead and plan a system.

Subsequently, the client will have relied upon the consultant to select the equipment, plan the programs, engage the services of someone to write the programs, and to plan the installation of the system along with all the reorganization that that implies.

The lawyer will then ask to see the contract between the client and the consultant only to be told that there never was one, or that the only basis upon which the consultant had been entrusted with these

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vital tasks was a series of loosely-drafted letters or, even worse, a mere telephone call. It is equally quickly apparent to the lawyer that the consultant has miscalculated that situation and is, on the face of it at least, principally responsible for many if not all the inadequacies that have come to light.

Breach of Contract

The lack of written contract however, means that the most effective, and certainly the quickest, easiest and cheapest remedy, namely an action for breach of contract, is not available to the client. In the absence of a written contract the client must resort to the far more difficult remedies open to him at common law, and meanwhile, his computer — and his business — may have to stand idle.

I have taken a few moments to set the scene in this way because it is terribly important to realize that the subject I am writing about — software licensing — is only one aspect, albeit important of course, of the process of installing a computer. I want to emphasize the importance of ensuring that every step on the road to computerization should be carefully embodied in a clear and unambiguous written contract.

Because of the lack of appropriate protection at common law, coupled with the novel, practical issues to which the computer gives rise, the lawyer advising the client in this field needs to apply a considerable degree of practical and creative skill to the task he is undertaking, to ensure that the client's interests are protected so far as they possibly can be.

Series of Contracts

The typical computer installation project is likely to involve a series of contracts, if the thing is properly handled, such as:

1. *A Consultancy Contract:* Be careful about them. They are real breeding grounds for disaster, dispute and dismay.
2. *One or more hardware acquisition contracts:* I use the word acquisition because the contract may be one of sale and purchase, it may be a lease or it may be a hire agreement. It may be mixed, certain pieces of hardware being acquired in different ways.
3. *The Software acquisition contracts:* The same thing applies and we shall come back to these.
4. *Maintenance Contracts:* It's vital, of course, to keep the system running once it's installed. If your system operates outside normal working hours it's important to ensure that maintenance is available if required.
5. *Training contract:* You must have skilled staff, and who will train them? Often the manufacturer will have a scheme; make sure there is a clear understanding about it.
6. *"Back-up":* There is always the possibility of a failure however reliable the system may be. If the computer is carrying out a vital task you must ensure that work can continue if the computer decides not to. Again, any arrangements with the manufacturer or another user must be embodied in a contract before your system is brought on stream. It's no good relying on sorting things out when the event occurs because

the need will only ever arise in an emergency when you want less, not more, problems.

7. *Documentation generally:* Any well designed computer installation will be fully documented and the lawyer should ensure that it is so and that documentation is made available to both suppliers and users. This will include, for example, a Functional Specification, a Systems Specification, one or more proposals, flow charts, test schedules, various manuals including systems design, operators instructions, maintenance procedures, training etc. and then the source codes; sometimes these will be available and sometimes they won't.

There may be other contracts and documents in individual cases, but the point I want to make is: First, the documents I have mentioned are vital, and second even if these contracts cannot all be embodied in one document — because, for example, the various components are being supplied from different sources — the lawyer or contracts manager must look at the documentation as a whole and make sure that it dovetails logically and practically and that the customer or user does not find himself having accepted (in legal terms) and paid for one part of an installation only to find that when the whole system is installed it doesn't work.

Before moving from the general to the particular I must make one more point. All that I advise will appear to be slanted in the direction of the user rather than the supplier. That is because I believe that it is less confusing, when dealing with this subject to view it from one angle rather than to keep switching positions and standpoints. I hasten to add that virtually all herein contained is relevant to and in the best interests of *both* parties to a contract — that is to have their relationship properly and thoroughly documented.

I do not believe in drafting contracts that are heavily biased in favor of one party or the other. In my view, the interests of all parties, certainly on one's own client, are best served by a realistic and comprehensive contract which covers all aspects of the transaction in terms that are as fair and as sensible as can be for all. The old dictum says, I believe, that a contract is an agreement which is the least disadvantageous for both parties. I agree.

WHAT ARE WE LICENSING?

I shall now turn to one small part of the contractual chain, the problems and peculiarities of software licensing.

Although the acquisition of software through a license is common it is not the only means. Software may be bought outright, and usually will be if it is made-to-order or bespoke. It may be the subject of a joint venture or joint-development project. Much of what follows is applicable to any method of acquisition, but I am concentrating on the licensing approach.

Before discussing a few special terms and conditions which should feature in a software license I think we should ask, "What are we licensing?"

The word license is defined in the Oxford English Dictionary as "a permit to do something" or "to permit

a thing to be done." That implies that somebody owns something that cannot be used, taken or imitated without permission. This is, of course, the precept upon which the whole rapidly expanding field of industrial property law is based. It implies that the law recognizes that property exists or may exist in the expression of an intellectual concept, but in the case of computer software things are by no means as straight forward as that. The law of patents and copyright, the common law relating to know-how and confidential information provide precious little protection in this field mainly, of course, because computer software is a new phenomenon which presents peculiar problems with which the common law was not designed to cope. It is this very lack of protection which makes the contract — and, of course, the license — so very important in this area, as affording perhaps the best form of protection available.

Perhaps it would help if I first wrote something about patent and copyright protection in particular.

PATENT PROTECTION

Patent protection, if it is available at all, is by far the most attractive and worthwhile form of protection. It involves the granting, and recognition at law, of a monopoly for a term of years. It is, of course, a valuable piece of property. One tends to think that computer software is excluded from patent protection altogether. Certainly, S.I. of the 1977 U.K. Patents Act sets out a list of items that cannot be the subject of a patent in Ss. (2) and included in that list is "a program for a computer." I think there can be no question but that a computer program per se has never been patentable in the U.K. The answer may differ in the U.S.A., but I here focus on the U.K.

There has always been interest and speculation in the question as to what if any protection patent law may actually afford computer software. Before the U.K. 1977 Act there were only four reported U.K. decisions on the subject, and these cases gave rise to the proposition to the effect that an invention which forms part of a computer program may well be capable of enjoying patent protection. I do not, unfortunately, have space to analyze these four cases here but the first two — *Slee and Harris's Applications* (1966) R.P.C. 194, and *Badger Co. Inc.'s Application* (1970) R.P.C. 36 — gave rise to the issue of a note by the U.K. Patent Office in March 1969 entitled "Patent Applications for Computer Programs" which included the following passage:

"Patents are not granted for computer programs expressed as such. No objection is, however, raised in respect of inventions for novel methods of programming computers to operate in a specified way, or for computers so programmed or for a tape etc. having recorded on it a novel program to control a computer to operate in a stated way. Nor, in general, is objection taken to inventions involving new uses of computers in controlling manufacturing processes or to methods of testing, involving novel programs, for computers under manufacture."

The two other cases to which I made reference were *Gever's Application* (1970) R.P.C. 91 and *Burroughs Corporation (Perkins) Application* (1974) R.P.C. 147. *Gever's Case* is of interest because it provided authority, at least under the 1949 U.K. Patents Act, for the

proposition that a punched card may be patentable if when used with a machine in a certain way it produced a certain desired result. The *Burroughs case* related to a novel means of transmitting data between a central computer and remote terminals. The U.K. Patent Appeal tribunal allowed the patent to proceed on the basis that it concerned the use of machinery organized to operate in a novel way. Of course, the other conditions to qualify for a patent must always be present.

Committee Reports

Following these cases the Banks Committee reported in July 1970. This committee had been set up by the President of the U.K. Board of Trade, as it then was, in 1967 to examine the U.K. patent system generally. Chapter 17 of that report deals with computer programs, and although that committee concluded that computer programs should be excluded from patentability it did state: "A distinction should . . . be made between applications for programs per se and for inventions of the kind claimed as a computer-controlled steelworks, power station or machine tool which involve the use of a program. The invention should then be patentable if it does not reside merely in the details of the program."

The Banks committee recommended that "the question of patentability of computer programs should be kept under review by the Board of Trade particularly in the light of international developments".

The Report of Sir Maurice Banks' Committee in 1970 led, of course, to the 1977 U.K. Patents Act. In general terms it would seem that S.1(2), to which I already referred, follows the then existing law. It is important to note that the exclusion from patent contained in S.1(2) relates only to a program per se and not to an invention which embodies a computer program. In other words, the present position would seem to be that, in the absence of any really authoritative case law since the 1977 act came into force in June 1978, if all the other conditions of patentability, as set out in S.1(1) of the act, are met, a U.K. court might be prepared to allow the grant of a patent for an invention described as a "computer programmed in a particular way". This might provide some scope for maneuver in an otherwise rather unfriendly environment for the computer program.

COPYRIGHT PROTECTION

Copyright protection is fundamentally different from patent protection since it affords no monopoly to the owner. Indeed, as was pointed out by Lord Pearce in *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.* (1964) (All. E.T.C. 465 at page 480 . . . "it is open to a rival to produce the same result if he chooses to evolve it by his own labors".

The protection afforded by copyright law is protection against others using the same means to arrive at the same result; that is, from poaching upon the intellectual creativity and skill of the owner of the copyright.

The principal weakness of copyright law is that it does not extend the protection of copyright to mere

ideas or concepts but only to the manifestation of those ideas or concepts in a tangible form. As Lord Devlin expressed it in the same *Ladbroke's* case: "The law has not found it possible to give full protection to the intangible. But it can protect the intangible in certain senses, and one of these is when it is expressed in words and print."

The 1956 U.K. Copyright Act, which still forms the basic authority for the subject in the U.K., not surprisingly makes no reference to computers or computer programs. To make matters even more difficult there have been no United Kingdom cases concerned with copyright in computer programs. The position on copyright is therefore even less certain and more unsatisfactory than the position on patents.

S.2(1) of the 1956 U.K. Act provides that copyright will exist in every original literary, dramatic or artistic work and it seems that "literary work" or "artistic work" is the relevant class under the act to cover the documentation and manifestation associated with a computer program. There can be little doubt that any aspect of a computer program which is represented in written or tangible form is protected to the extent of the writing or actual form — so a punch card bearing the markings of a program would enjoy copyright protection.

However, it does not require a great mind to realize that this level of protection is far less important than protection of the idea or concept embodied in the program, and the expression of that idea or concept in machine readable form which together form the crux of the program and the value of it. For this there seems to be no protection, at least until such time as the courts decide that the notation of the program in the processor can be brought within the definition of "writing".

The Whitford Committee in its report in 1977 recognized the need for protection of computer programs and thought that such protection could be achieved by extending the definitions of literary and artistic works under the existing legislation rather than by creating a new class for software.

I know that pressure is being brought upon the U.K. government and other governments as well to extend protection in this manner. Draft bills have been submitted in the U.K for discussion. One can only hope that the matter will receive attention since the situation is at present most unsatisfactory.

PROTECTION OF CONFIDENTIAL INFORMATION

In S.46(5) of the U.K. Copyright Act, 1956, there is a statement to the effect that "Nothing in this Act shall affect the operation of any rule of equity relating to breaches of trust or confidence".

It is, of course, well established at U.K. common law and in the law of most countries that the unauthorized disclosure or misuse of information by anyone in possession of it on the express or implied understanding that it is confidential will expose the person disclosing it to a civil action for breach of confidence the remedies for which lie in the fields of injunction and damages.

The U.K. common law concept of confidence was

formally recognized by the courts in the mid 19th century — the two leading cases of that time being *Prince Albert v Strange* (1849) 18 L.J. Ch. 120 and *Morison v Moat* (1851) 21 L.J. Ch. 248. A more recent authority is to be found in the *Saltman Engineering Co. Ltd v Campbell Engineering Co. Ltd* (1948) 65 R.P.C. 203 case. It is interesting that this case was reported in the Reports of Patent Cases in 1948 but did not feature in the All England Reports until 1963, presumably because its general relevance who not at first recognized. In this case, Lord Greene — at the time the Master of the Rolls — made the following observations:

Information to be confidential must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the documents has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

This concept is easily applied to computer software and affords perhaps the most useful and reliable source of protection. It must, however, be borne in mind that it is unwise to rely solely upon the common law right. The lawyer's job, of course, is to ensure that his client is placed in the strongest possible position and the lawyer must therefore manipulate or supplement the common law by the careful and skillful use of contract. Nowhere is this more so than in the field of the computer, a phenomenon which, as I pointed out, was not around when the old common law principles were established.

It is worthy of particular note that Megarry J. in the U.K. case of *Coco v A.N. Clark (Engineers) Ltd* (1969) R.P.C. 41 drew attention to three basic ingredients which are essential prerequisites to a successful action for breach of confidence: First, the information that is the subject of the complaint must be confidential; second, the information must have been communicated in circumstances in which the obligation of confidence was apparent, and third, there must have been, or about to be, an unauthorized disclosure or use of the information.

In order to ensure that these three conditions are fulfilled my advice is that the relationships between the parties should always be embodied in a clearly, unambiguously drafted contract.

THE SOFTWARE LICENSE

Let us now look more closely at the software license on the basis that what I have written so far demonstrates the importance of the license.

I am not going to make reference to clauses in, or aspects of, licenses of a general nature. I shall deal with matters that are of special importance when the subject matter is computer software. Nor am I going to write about other methods of acquiring software, or the right to use software, although many of the points to which I shall make reference should feature in all such contracts. Certainly, some provisions that should feature in a software license should certainly feature and be repeated in various of the other contracts

which form the chain of contracts, to which I referred earlier, covering the entire computer installation.

The purpose of the license is to establish the rights of the parties, their responsibilities and liabilities in relation to the subject matter of the license and as between each other and in some instances as between themselves and third parties.

The first crucial requirement is that the subject matter of the license be clearly and unequivocally defined. Immediately, therefore, we are brought face to face with the documentation to which I made reference earlier. You should ensure that the Functional Specification, the Systems Specification and the various flow charts and manuals are actually embodied as schedules to the license or, second best, that they are identified at the time the license is entered into and are expressly incorporated into it.

The Functional Specification is the all important document which will set out and describe in detail, but in simple language, what the system is to be designed to achieve. It is a document that should ideally be produced by the customer or licensee or at least with his close involvement.

Following the drawing up of a Functional Specification a Systems Specification will be prepared. This will usually be prepared by the person or organization which will be programming the computer. Its purpose is to translate the Functional Specification into a computer programmable form. Again, however, the respective responsibilities of those involved—be they consultant, software house, other advisers and customer—must be clearly defined. The common law right of the customer to repudiate the contract with the relevant party, if his system totally fails to perform, and to seek alternative services and recover damages, even consequential damages, is of little comfort if he simply wants to get the system working at the earliest possible moment.

Establish Needs

The licensee must in this way establish his requirements and satisfy himself that these are communicated to the licensor together with required performance levels, terminal response times, etc. No doubt, whether software is being specifically written for and licensed to the licensee or the license is of a standard package, certain representations as to its appropriateness and effectiveness will be made by the licensor. I believe it is most important that all such representations whether originally made orally or in writing should be embodied in the license, usually in a schedule, so that if a dispute arises at a later date as to the performance of the software representations can easily be referred to. In this way a court will be able that much more easily to assess the situation.

The license should contain warranties relating to the software meeting specifications, dealing with such matters as normal performance levels, terminal response times, mode of operation and transaction volume standards, etc.

Most software packages will require some modification to suit an individual licensee's specific requirements. Some licensors will not permit amendments, but, assuming that they are permitted, it is most im-

portant that the matter be spelled out in the license. Who can alter the software and on what terms?

As programming proceeds, changes will almost certainly be required to the original scheme of things. Some of these changes may appear to the licensee to be incidental but, in programming terms, they may actually be fundamental. Many disputes when they arise—often because of late delivery of software, systems failure or added cost—will result in the programmers putting forward the argument that the problems arose because of changes introduced by the licensee as work progressed. Only if proper provision for such eventualities has been made in the license and the procedure for making and costing such changes has been laid down, as well as the individual (s) with authority to order changes identified and named in the license, can such disputes stand a chance of being resolved in a relatively painless and practical way.

What about the licensed programs being run in conjunction with other programs? Will that impair effectiveness and importance? If so, is that provided for in the license? What about the possibility of infringement of third-party industrial property rights if programs are merged?

Timing is another area which will require thought and planning and the licensor will be expected to bear responsibility for ensuring that the predetermined timetable is adhered to. If time is a critical factor for the customer it must be stated and a detailed table of events or what I usually call an "Implementation Plan" must be prepared and included as a schedule to the license. The criteria for deciding when and whether each stage has been reached should be set out.

Implementation Plan

The Implementation Plan will set out details as to delivery of software and installation. The license must also deal in detail with the testing and acceptance procedures for the software. Testing will usually be carried out on each separate program as it is installed. It must be tested either on the licensee's own hardware or identical hardware elsewhere, either within the software house or on another user's equipment.

Testing of individual programs is one thing but it is naturally the whole package that really matters. Certainly a final acceptance certificate should not be given until all the software is installed on the licensee's own hardware and tested on live data. Software will almost always embody faults—called "bugs"—initially and these have to be ironed out during testing. It will usually take several months for software to settle down and stabilize. The software house will invariably try for contractual purposes to speed up the testing and acceptance process so that payments are speeded up. This should be resisted, if you are the licensee, and the usual compromise is to agree a scheme of progress payments with a retainer at the end so that the final payment of, say, 10% of the price is not made until the end of the stabilizing period which is normally agreed at about six months. Again, the acceptance certificates must be given by the licensee or its agent and not the software house or licensor.

The license will probably go on to impose some restrictions on the licensee relating to use of the software and the number of copies which can be made of the programs. Again, clarity is the order of the day. Is the license only for a particular type or installation of hardware? What about its being used on alternative hardware in an emergency if a failure of the specified hardware occurs? After all, the licensee's business must be kept going.

Ownership

Ownership of the software must be dealt with. Usually ownership will be retained by the licensor and it is important that the license should contain provisions dealing with non-disclosure. It will be recalled that confidential information will only be protected so long as it remains secret and is stated to be such.

Of course, a licensor will not normally disclose source and object codes to a licensee, since they form the key to being able to tamper with it. Without access to those codes the licensee will find it difficult to exploit the software beyond the scope of the license, by way of sublicensing or assignment. There are, on the other hand, occasions when access to the codes can be extremely important for the licensee—for example, if the licensor runs into financial difficulties or has a receiver or liquidator appointed, so that he can no longer provide support for the software.

The licensee may have a partly-finished system which would be very difficult for anybody else to finish, at least within the original cost and time estimates. To some extent this is a question of the customer choosing his software supplier carefully but two particularly important protections can be built into the license, viz:

1. The working papers of the licensor in relation to the project should vest in the licensee: this will enable the licensee or another supplier to complete the software installation.

2. The licensee should require a copy of, or at least access to, the source code for the software. This will enable the licensee or another software company to understand the programs for the purposes of finishing and maintaining the software or rectifying errors in it.

If the licensor is reluctant to release source code listings a compromise is usually acceptable whereby they are deposited with an independent party, such as a bank, to be released only upon the fulfilment of certain conditions.

The period of the license is again of special importance in the case of software. Clearly, without software a computer installation will be useless. So, if a licensor can terminate the license more or less at will the licensee will be living or running his business on a knife edge. From the licensee's point of view the license should be irrevocable by the licensor. If that cannot be achieved the licensee must ensure that any termination provisions are realistic. If the license is terminated by either party the license should provide for return or destruction of all copies of the programs to preserve confidentiality, etc., if it still exists.

Other important matters that a licensee should

check upon before entering into a license include:

—The standard of documentation to which I have already made reference.

—The availability and standard of support services, maintenance, etc.

Support

As mentioned earlier, software will take a while to stabilize. During that period support must be readily available. Thereafter, maintenance will be required to correct faults, to introduce amendments to the software to reflect changes in legislation or the licensee's working requirements. Maintenance must be available for the whole of the anticipated life of the software. There will also be improvements and developments to the software by the licensor. They should presumably be made available to the licensee, but upon what terms? Will this be done automatically or only upon request?

The license should place the licensor under an obligation to use and engage only properly skilled personnel in connection with the software, support services, amendments, developments etc. The licensor will often expect a provision whereby the licensee also uses only properly trained staff. I mentioned training earlier. It is important that staff be properly trained, and if the licensor is to provide training the license should deal with it or alternatively there should be a separate contract.

The licensor will often seek a clause whereby information given to him by the licensee and upon which he may make important decisions is warranted to be accurate. It is advisable for both licensor and licensee to appoint a single person in each of their organizations to serve as principal liaison or communication. So often instructions are given by several people who either deny it later or who, unbeknown to the licensor do not have the authority to give them and a dispute ensues. The individuals should be named in the license so that the parties will then know from whom they take instructions and directions and who bears the ultimate responsibility from the other's point of view. The liaison should be fully empowered to make decisions, give instructions and to bind the principal.

During the course of his work the licensor is likely to gain access to information of a confidential nature about the licensee's business. The license should, therefore, contain appropriate secrecy provisions. Similarly, the licensor and licensee are likely to get to know key members of each other's staff very well and either may be tempted to offer employment to a member of the other's staff. If this happens, it could, of course, prove highly detrimental to the effective establishment of the systems being installed and to a deterioration in relations at a vital time. It is therefore worth considering some restriction to prevent this happening.

The software license will have provisions relating to infringement of third-party industrial property rights. Again, the legal situation and the procedures agreed to deal with a challenge are one thing, and must obviously be dealt with, but what is most important is keeping the licensee's installation up and run-

ning. The license must cover arrangements, therefore, for back-up, substitution and so on.

EXCLUSION CLAUSES

A word about exclusion clauses—now, of course, subject to the tests set out in the U.K. Unfair Contract Terms 1977. The field is wide open and so far there is precious little help for the lawyer trying to advise upon the reasonableness test. I am going to suggest, however, that the standard of care and responsibility that can reasonably be expected of a computer manufacturer or a software house should be higher than may be expected in many other circumstances. This is because of the critical function that is likely to be performed by the computer. It is important to establish an appropriately high standard for the reasonableness test, should it ever come to be applied, and it is for this reason that I suggest that great care is taken over preparing, and incorporating into your contracts, such items as the Functional and Systems Specifications, the Schedule of Representations, Acceptance Test Criteria and procedures. So long as these items are included you can negotiate reasonable exclusions but on the basis that a supplier should be prepared to stand by his product.

The existence of the U.K. Unfair Contract Terms Act may give the customer some sense of protection, but too much reliance should not be placed upon the act. The aim should be to attain in the contract a fair division of risk between the parties. The courts may be loath to upset arrangements which have been negotiated between two commercial undertakings, unless the bargaining power of the two sides is clearly uneven.

If the licensee cannot obtain a division of risk which he can accept as reasonable, but the license is nevertheless entered into, the licensee should consider informing the licensor, in writing, that, although he is signing the license containing exclusion clauses, the licensee does not regard them as reasonable. This may have the effect of reserving the licensee's position in the event that at some later stage he wishes to argue that the clauses are unreasonable.

The attack on exclusion clauses did not begin in 1977 with the U.K. Unfair Contract Terms Act or even in 1973 with the U.K. Supply of Goods (Implied Terms) Act, but much earlier with the evolution of certain rules of the U.K. common law. Most important is the doctrine known as "fundamental breach". It is a vague doctrine indeed but very broadly it holds that an exclusion clause will not be upheld if it strikes at the very core or essence of the contract. For instance, if in a contract of sale, the exclusion clause excuses the seller from liability if he totally fails to deliver the goods.

The U.K. common law also uses certain techniques of construction to limit the effect of exclusion clauses. For instance, if the clause appears to cover only contractual liability, it will not apply where there is negligence.

The U.K. Unfair Contract Terms Act represents a most important step in the attack on exclusion clauses. This act refers to exclusion clauses in contracts for both goods and services. It is worth noting

that S.11 of that act shifted the burden of proof so that it is now up to the person wishing to rely upon an exclusion clause to show that it is fair and reasonable.

Section 2

Section 2 deals with negligence, which is defined in section 1 as including the breach of *inter alia* any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract.

By section 2 (1), liability for death and personal injury cannot be excluded; liability for other loss or damage may be excluded if the requirement of reasonableness is met, the guidelines for assessing the requirement of reasonableness being as set out in Schedule 2 of the act.

It is worth noting Section 2 (3) of the U.K. Act which states: "Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk." Some standard terms of business nowadays recite the fact that the user has seen the exclusion clauses and considers them fair and reasonable in all the circumstances—an obvious attempt to circumvent the act. In view of Section 2 (3) it is doubtful whether, so far as negligence is concerned, a recital of this nature would carry much weight in a court of law. It is however better not to force your client to have to bring the test case on this or any other issue.

Section 3

Where a customer is asked to and does enter into an agreement or license on the supplier's "written standard terms of business" — as is so often the case in the computer field — whether the supply is of goods or services, Section 3 of the U.K. Act will apply, unless the customer is a consumer as defined in Section 5 of the act. Subsection (2)(b)(i) of Section 3 purports to establish some guide as to the standard of performance which may be demanded from the supplier. It is expressed in negative terms, thus: *the supplier "cannot by reference to any contract term. . . . claim to be entitled. . . . to render a contractual performance substantially different from that which was reasonably expected of him. . . . or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all. . . . except in so far as. . . . the contract term satisfies the requirement of reasonableness"*.

The fact that there is no statutory or, as yet, judicial, definition of the expression "written standard terms of business" and that the expression "reasonably expected" in Subsection (2)(b)(i) lacks any reliable interpretation, makes it all the more important for the customer to seek a well drawn and unambiguous contract while the supplier will, of course, be resisting all such attempts.

Most computer or computer-related contracts will purport to exclude the liability of the supplier for "consequential" loss, that is losses suffered by the user beyond those which were reasonably foreseeable at the time the contract was entered into. This might be considered to be a reasonable exclusion unless, again, such consequential losses are definable and are

made known to the supplier.

The message has to be, when acting for a U.K. user, not to rely upon the U.K. Unfair Contract Terms Act to avoid the effect of exclusion clauses. The field is so wide open the risks too great. After all, one's professional duty is to place one's client in the strongest position possible. Exclusion clauses should be carefully drafted so that they remain within the bounds of reasonableness.

CONCLUSION

For many clients, the installation of a computer system presents an entirely new situation. The client has no previous experience and does not know where to start and certainly has no concept of the legal pitfalls and vital precautions of which he should be aware and take account. On top of the client's ignorance and inexperience he is confronted very often by high pressure sales techniques including all the usual rash promises and representations that are so often made and, of course, the standard form terms and conditions of contract which he is expected to sign on the spot and, alas, so often does so without taking expert professional advice. And then, again, in so many

areas, the U.K. common law provides no protection at all or at best inadequate or inappropriate protection.

I hope I have illustrated to you how essential it is to obtain the maximum possible protection through the medium of contract. In order to do this, of course, the lawyer needs himself to understand the subject matter.

That is not to say that the lawyer advising in this field needs to have a detailed and sophisticated technical knowledge — while that may help and be desirable it is not essential — but the lawyer must at least have some knowledge and understanding of what the computer is, how it works, what the client expects of it and its limitations. With that knowledge, the lawyer must have a feel and understanding for where the problems are likely to arise before, during and after the system is installed. It really isn't like purchasing a new suite of office furniture or even a conventional accounting machine. Not many lawyers have this knowledge or awareness yet but we are learning fast that the computer — and its implications — are something special.

The field of licensing is full of pitfalls, but never more so, I would suggest to you, than when the computer is involved.

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