

Software asks the questions: what's the law's response?

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Abstract

Predictions for developments affecting IT lawyers in the future include an increased reliance on technology by businesses and the accompanying need for security and protection.¹ As technology continues to develop and diversify, with latest innovations including BlackBerry and mobile phones which morph into portable televisions² we should question what fresh challenges face the law?

This paper is drawn from a current work in progress which investigates this issue. The broad topic area is an analysis of the scope of contractual liability for defective software and a consideration of the rights and responsibilities of a software supplier. Within this context the fundamental question is - why is software special? Through exploring this, the challenges which are faced by contract law in responding to both current and future technological advancements should be readily recognised and definable. The answer to the question is structured into two parts: identifying the ways in which software can be supplied and; examining the nature of software defects. From documenting the methods by which software may be made available and studying the nature of problems which may arise from its operation, this approach enables some basic parameters to be defined, within which to consider the appropriate scope of contractual liability for defective software.

Software is typically supplied under a licence and the scope of the licence and the contractual basis upon which it rests will need to be determined. A variety of types of software may be supplied, ranging from, for example specialist bespoke programs through to general customised commercial software, to, at the far end of the spectrum, mass-marketed standard software. The type of software may be a factor to consider when determining the manner through which contractual liability for that software should arise. Moreover, bespoke software for a complex project may be governed by a detailed, extensively negotiated, individualistic agreement between the supplier and customer, whereas in the case of the supply of off-the-shelf standard software, shrink-wrap licensing may be employed to establish a direct contractual relationship between the parties. The validity of the different ways in which software may be supplied is questioned within the paper in order to ring-fence the different permutations which the law in this area must be in a position to deal with. The paper questions how future developments in technology and different methods of supply of that technology can be appropriately regulated by the law.

The second element of the study is to explore the nature of software defects. It may be summarised that software defects can occur either at the design stage, in which case there will be a failure in each copy of the product; or at a production stage whereby the defected copies will be more limited in number.³ In respect of software testing it is often cited that it is 'impossible to test even the simplest program in an exhaustive fashion'.⁴ Evidence for this submission is presented within the paper and the implications of this situation are examined in detail. The discussion at this stage brings in issues relating to the maintenance of software and the underlying theme that the supply of software may not be merely a one-off transaction between the parties but rather the start of a continuing working relationship. The appropriate extent of the responsibility of the supplier to correct software bugs and to provide software enhancements is questioned and consideration is given to the impact and demands which future technological developments may place upon the contractual relationship. By exploring what makes software special, suggestions for how the law should respond to future technological developments may be proposed.

¹ Desai (2006) Predictions 2006: More Technology, More Protection *Comps & Law* 16(5) p12.

² Burden (2006) Predictions 2006: A Miscellany *Comps & Law* 16(5) p8.

³ Lloyd (2004) *Information Technology Law* p570.

⁴ *Ibid* at p571.