OLIVIA WHITCROFT

"It was the dawn of e-commerce, and we were trying to apply offline law to the new online world"

Olivia rolls back the years to when the internet was reshaping laws and – would you believe it? – data protection wasn't considered a sexy subject

Following the recent Argos TV debacle, companies venturing into the new world of e-commerce should review their process for contracting over the web. Argos advertised its televisions on its website for £2.99 instead of £299, and was deluged with orders, which it is now reluctant to fulfil. Was there a valid sales contract or not? Stay tuned for the new Electronic Commerce Directive from the European Union. This will clarify the moment at which an electronic contract is concluded, which could impact the outcome of similar cases in future.

With Y2K just around the corner, it is also vital to check that your IT outsourcing contracts address business continuity issues as we move into the year 2000. While you're about it, you should build in additional provisions relating to the use of personal data. New data protection requirements for arrangements between organisations and their IT providers (processors) will apply from March 2000.

And with the evolution of interesting "peer-to-peer" software, rights holders need to have a hard think about how to protect their creative works. Napster claims not to be copying or authorising the copying of any music; all it does is provide the software. So should rights holders be trying to stop these communications, or perhaps embracing new ways to exploit their works?

What are you on about, Olivia?

Sorry about that. I was reminiscing about the excitement at the end of 1999, when I started my legal career. Having daydreamed through *PC Pro*'s 30th anniversary edition, I'm late to the game in giving you my account from the good old days of tech law.

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"IT and IP were trendy areas of law to be involved with (and still are, obviously)"

It was the dawn of e-commerce, and we were trying to apply offline law to the new online world (such as electronic contracts in the Argos case), and digital formats were testing traditional copyright law (such as with Napster). Our contracts were trying to predict unknown liabilities (such as for Y2K). New legislation to modernise the law was on the horizon, including the EU Electronic Commerce and Electronic Signatures Directives, and the UK Data Protection Act 1998 and Distance Selling Regulations 2000 – though these were arguably somewhat out of date already, deriving from EU Directives from 1995 and 1997.

IT and intellectual property were trendy areas of law to be involved with (and still are, obviously). Data protection was not a trendy area to be in, and was largely ignored by lawyers and non-lawyers alike. Any talk of data protection would cause others to glaze over and leave the room. So it was safest to call oneself an IT lawyer, and just sneak in some data protection advice when no-one was looking.

Drafting contracts

As (trendy) IT lawyers, we were getting better at using clear and fresh language in our contracts, rather than the archaic language for which lawyers had been known. We were preparing contracts for relationships and issues that had never existed before. I learnt to be bold with drafting new provisions; you don't always need to use a template or copy terms that have been used before, particularly when relevant templates and terms don't even exist. This continued as we rushed forward through time with new technologies and relationships: cloud computing, app development, software-as-a-service, AI supply chains...

As a very junior lawyer, I did a fair bit of proof-reading of contracts drafted by the not-quite-so junior bods. With my maths degree still fresh in my mind, logical flaws worried me a lot. Let's take an example:

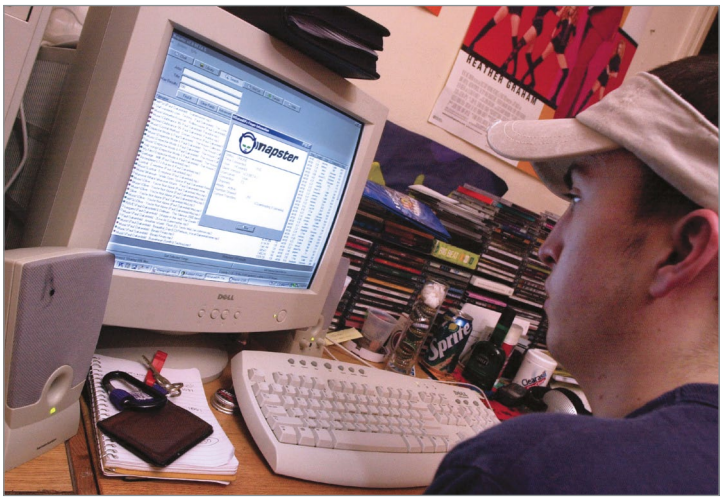
- **"Services" means the services set out in the SOW.**
- **"Service Fees" means the fees to be paid for the Services, set out in the SOW.**
- **"SOW" means a statement of work setting out the Services and Service Fees.**

Substituting in the definitions we know, an SOW is: a statement of work setting out the services set out in the SOW and the fees to be paid for the Services, set out in the SOW.

Expanding it again: a statement of work setting out the services set out in the statement of work setting out the Services and Service Fees, and the fees to be paid for the services set out in the statement of work setting out the Services and Service Fees, set out in the statement of work setting out the Services and Service Fees.

I could go on. In this simple example, I'm hopeful the courts would have coped with interpreting the intention (provided the SOW itself was clear). But I was also learning the importance of precision in drafting, seeking to avoid gaps, lack of clarity and unfavourable interpretations.

By the way, for those who wish to challenge my earlier comment that the Electronic Commerce Directive would define the moment at which a contract is concluded, you're correct. This proposal was removed during the legislative process and replaced



BELOW Napster's rapid rise brought challenges for the legal profession

with a requirement to acknowledge receipt of an electronic order, leaving some flexibility for e-commerce providers to decide on their own process for contract formation.

Intellectual property

Ways to exploit creative works were evolving. It was well established how copyright laws applied to music on physical media such as CD-ROM, and some crafty drafting of licences sought to capture rights on other media that were yet to be invented. But how about digital distribution without physical media? While legal action was taken against Napster in the US for its "unauthorised" model, P2P software fuelled a change to how music was licensed and delivered, quickly popularising lawful distribution of the MP3 format. In 2001, copyright law caught up under the EU Information Society Directive, which covered rights of communication to the public.

Rights in software were also under debate. As well as copyright protection, a hot topic was whether computer-implemented inventions could be protected by patents. In the US, Amazon was granted its "1-Click" patent in 1999, for purchasing items with one click of an online button. Under the UK Patents Act 1977 (and equivalent EU law), computer programs in themselves were not (and are still not) capable of patent protection. There was growing discussion over the concepts of software inventions with a "technical effect" or "technical contribution" going beyond the computer program in itself, which may, therefore, allow patentability. Now, how about AI-implemented inventions?

Oh, and domain names! In fear of cybersquatters, organisations were registering domain names incorporating their brands with every possible country extension, combination of letters and misspellings. As IP lawyers, our role in managing trade mark portfolios was expanding to include domain name portfolios. In the big 1998 "One in a Million" case, companies such as BT and Marks & Spencer had been successful in their action against an organisation buying up domain names to sell to the brand owner. However, applying trade mark and passing-off laws to domain names wasn't easy, particularly as mere registration of a domain name doesn't necessarily involve use of that domain name (for example, on a website). In the years to come, domain name registries (such as Nominet in 2001) would start their own dispute resolution procedures, making it easier (and less costly) for brand owners to object to dodgy registrations.

Sneaking in some data protection

Addressing new legal issues was exciting for all involved, with the exception, mysteriously, of data protection. I continuously hit a stone wall talking about data protection rules. The best I could hope for was a stifled yawn and weary agreement to copy principle 7 (of the Data Protection Act 1998) verbatim into a contract or two:

"Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data."

Seemingly little consideration was given to what that meant in practice, and to the rights of individuals and fair processing concerns.

This went on for years. I tried my best to grab attention. I even wrote a data protection song and performed it (with some keener members of the team) at a firm talent contest. But I failed to impress the judges and was rated bottom – talentless.

All of a sudden, in 2016, the GDPR hit the shelves, and people wanted to listen. They started asking about these "new" data protection issues, which were mostly very old ones that they had just ignored previously.

That's probably as much data protection attention I can grab from you, too, so I'd better move on.

Legal research

There were a few online and digital resources for legal research; I recall using Lawtel online, and Westlaw on CD-ROM. But the library was a marvellous place, full of wonderful paper books. You would read a book, look for updates in supplementary books, then take a trip down to the Law Society Library to look at more books, journals and cases on microfiche.

It was the start of the dangers of simply Asking Jeeves for an answer. You could type in your legal query to Ask Jeeves, Yahoo! or a new colourful search engine called Google (with a delightful expanding number of "o"s in Goooooooooogle, which was why I stuck with it), and would find some free article on the topic published online. A quick and (not so) brilliant way to do your research with time left to pop over to Coffee Republic for a latte and a spinach pasty.

With the growth of reliable online research sources also came the growth of unreliable research sources, as more and more legal "experts" were publishing their views online. Now, of course, we have generative AI giving us even more convincing, but often fabricated, legal answers from its own research.

1999 to 2024

Since 1999, hot topics have progressed from outsourcing to cloud computing, websites to apps, Y2K risks to cybersecurity risks (and Y2K38?), file sharing to online marketplaces, software inventions to AI-generated inventions, domain names to social media handles, the Data Protection Act 1998 to the GDPR, and search engines to gen AI, all bringing exciting new legal challenges with them.

And, of course, data protection lawyers have joined technology and intellectual property lawyers in the club of trendy lawyers. Maybe.

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ABOVE Copyright laws that applied to physical media such as CDs were unsuitable for the internet age

"I tried my best to grab attention. I even wrote a data protection song"

BELOW Amazon was granted its "1-Click" patent in the US in 1999