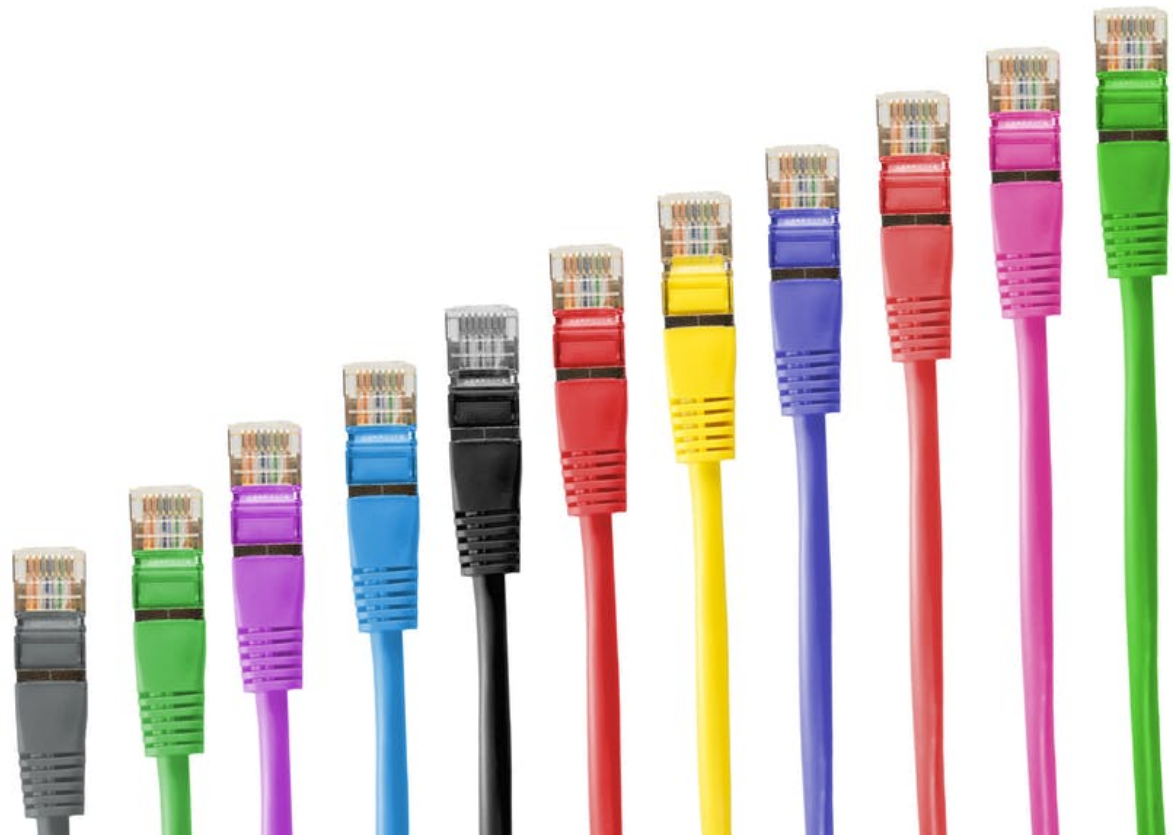


Your World First

E-commerce and the law

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Overview

- Contracting via the internet
- Selling goods and services online
- Consumer law and rights
- User generated content – liability and defences
- Data, privacy and marketing
- Advertising
- Brexit



Case Study

- Bill is a 3rd year computer science student with an obsession with his local football team “Cambridge Athletic”
- He designs and sets up a website for his fellow Cambridge Athletic fans
- There is the facility for fans to set up their own profile on the site, and privately message each other
- Bill also decides to recoup some of his set-up costs for the site by selling Cambridge Athletic merchandise



Contracting over the Internet

The basic requirements

- For a contract to be binding:
 - Offer
 - Acceptance
 - Consideration
 - Intention to create legal relations and certainty of terms

- A business will want to structure its site as an “invitation to treat” (not capable of acceptance) and ensure the consumer is the party making an offer



Signing a contract online?

“ *Digital signatures, scanned manuscript signatures, typing one’s name (or initials) and clicking on a website button are, in our view, all methods of signature which are generally* capable of satisfying a statutory signature requirement. We say that on the basis that it is function, rather than form, which is determinative of the validity of a signature. These methods are all capable of satisfying the principal function: namely, demonstrating an authenticating intention.*

**Some exceptions apply (e.g. contracts to buy property)*



***Electronic Commerce: Formal Requirements In Commercial Transactions
Law Commission - December 2001***

Contracting over the Internet

Information requirements

What information does Bill have to give consumers when offering goods and services online?

- Short answer = LOTS!
- What information must be given
- How it must be given
- When it must be given



E Commerce Regulations 2002, Companies Act 2006 and Consumer Contracts Regulations 2013, ADR Regulations, Provision of Services Regulations 2009

Contracting over the Internet

Information requirements

General information requirements:

- Identity of the trader (e.g. name, address, VAT number, company no, contact details)
- Main characteristics of goods, services, digital content
- Information about the consumer's right to cancel (and model cancellation form)
- Digital content's functionality and technical protection (if applicable)
- Digital content's compatibility
- Payment, delivery and performance arrangements
-etc. etc. etc.

Consumer Contract Regulations 2013

Contracting over the Internet

Information requirements

- Information to be given before the order process begins
- Delivery restrictions
- Accepted means of payment
- What technical steps are required to conclude the contract
- Will concluded contract be filed and accessible?
- How to identify and correct input errors prior to placing order.
- Languages offered for contract

Consumer Contracts Regulations 2013, E-Commerce Regulations 2002

Contracting over the Internet

Information requirements

Directly before placing an order

- Main characteristics of goods, services, digital content
- Total price
- Additional delivery charges and other costs
- Minimum duration of the contract

Consumer Contracts Regulations 2013

Contracting over the Internet

Other requirements

- Include an order button, labelled and easily legible, indicating an obligation to pay e.g. “Pay now”

- Avoid using pre-ticked boxes



- If providing customer helpline number, this must be basic rate only

Consumer Contract Regulations 2013

Contracting over the Internet

Confirming an order

After the order has been submitted, Bill must:

- Acknowledge the receipt of an offer “without undue delay”
- Take care this acknowledgement of an offer is not “acceptance” – this can be done later
- Provide a copy or confirmation of the contract – on a “durable medium” (e.g. paper, email or personalised account) including the characteristics of the goods or services, identity of supplier, total price including tax or monthly cost in the case of subscriptions, any additional charges, duration of contract or conditions of termination

Consumer's right to cancel

- 14 day “cooling off period”
- Bill must tell consumers about their cancellation rights
- Bill must provide a model cancellation form
- Goods: Starting from the date that consumer takes possession
- Services: Starting from the date the contract is entered into
- Can be excluded for digital content and some services with the consumer's agreement

Consumer Contract Regulations 2013

Consumer Rights Act 2015

Implied terms

Goods and (paid for) digital content:

- Satisfactory quality
- Fitness for purpose
- As described
- (For digital content only) compensation for damage

Services

- Reasonable care and skill
- In line with information provided
- Reasonable price (if no price agreed)
- Performed within a reasonable time (if no period agreed)

Contracting with consumers

- Consumer terms must be:
 - Fair
 - Reasonable
 - Written in plain English
- Unfair terms will not be binding on a consumer



Consumer Rights Act 2015

Unfair practices

- “Unfair commercial practices” are prohibited
- Misleading consumers, aggressive commercial practices etc.
- Can result in criminal liability
- List of practices which are automatically considered unfair, include
 - Certain false claims (e.g. cure illness)
 - High pressure selling techniques (e.g. “you could be in danger if....”)
 - A business pretending to be a consumer (e.g. when leaving product reviews)
 - Describing something as “free” when there are costs other than the unavoidable cost of delivery/collection

Consumer Protection (Unfair Trading) Regulations 2008

Game time

- Bill’s website is generating a lot of web traffic, and in an attempt to capitalise on the website’s success, Bill builds some new features:
 - A Cambridge Athletic online game for website members; and
 - A mobile app to mirror the website.



CMA principles for apps and web-based games

- Be transparent and accurate about costs associated with a game (including the costs of any in-app purchases)
- Make the commercial intent of any in-game message clear – distinguish commercial messages from gameplay
- Don't include direct exhortations to children to make purchases or otherwise pressure them to make purchases (or persuade a parent to make purchases for them)
- Make it clear payments should not be made without the informed consent of the person who owns the bank account - opt-out consent not sufficient

Compliance

- Both studios and platforms must comply
- Range of actions in case of breach, including court proceedings

Law of Tort

- A civil wrong
- Law of tort demands that, in certain circumstances, we are answerable for our actions

Negligence

Trespass

Defamation

Interference

Misstatement

**Product
liability**



Tort of Negligence

Bill offers via his website various “Cambridge Athletic” related files, such as screen savers and videos that registered users of the site can download for free. He doesn’t use anti-virus programs to check the files. The files infect his users’ computers with a virus. Bill’s website contains no disclaimers or warnings about viruses, worms etc.

What would his users need to prove to sue him for negligence?

- Duty of care is owed
- Breach of duty
- Breach of duty caused damage
- Damage was reasonably foreseeable



Liability for User Generated Content (UGC)

Users of Bill's website have been uploading infringing videos and photos of the first team.

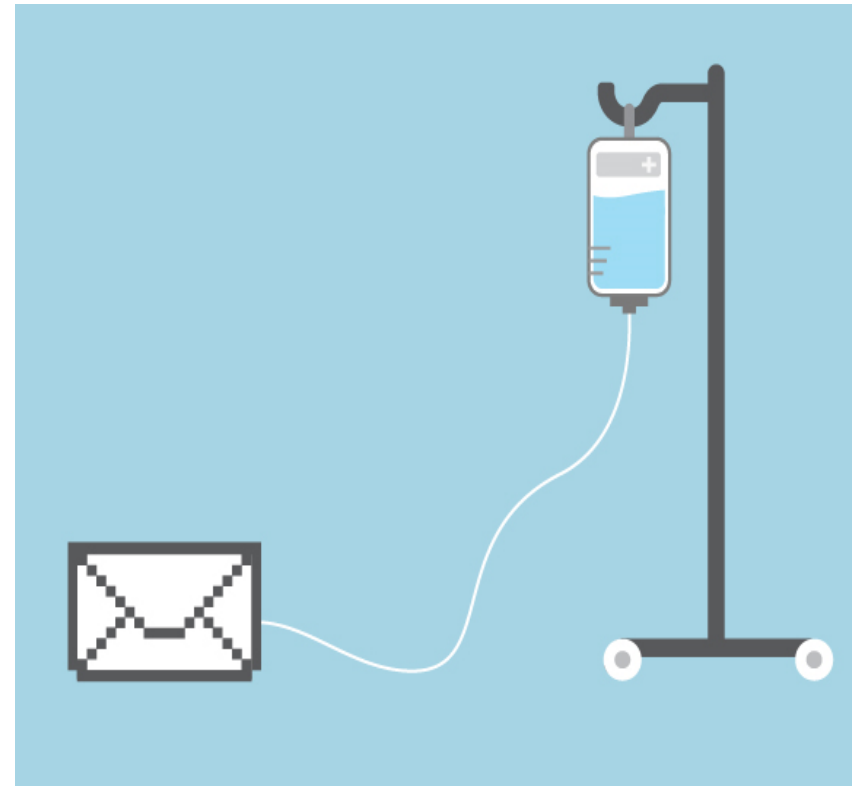
Cambridge Athletic send Bill a letter asking him to remove the videos of the team – and threaten legal action for copyright infringement if he doesn't comply.

Can Bill be liable for the content posted by users of his website?

Defamation Act 1996, Defamation Act 2003, Electronic Commerce Regulations 2002

Marketing emails and texts

- Bill has collected lots of email address and mobile numbers as a result of users placing orders for merchandise or signing up to use the site
- He wants to use that data to send his members promotional materials in an attempt to further increase sales
- He also wants to share that data with another business overseas for its own purposes



What are the data protection issues here?

Data protection – key legislation

1) *General Data Protection Regulation (GDPR)*

- In force from 25 May 2018
- Overhaul of the law
- Headlines:
 - Huge fines for non-compliance
 - Extra-territorial effect
 - Data processors directly regulated



2) *Data Protection Act 2018*

3) *Privacy and Electronic Communications Regulations 2003*

Data protection – Key terms of the GDPR (Article 4)

Personal Data

- “any information relating to an identified or identifiable natural person...”
- Remember “special category” (a.k.a. sensitive personal data) too

Processing

- “any operation or set of operations which is performed on personal data or on sets of personal data...”

Processor

- “a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller”

Controller

- “the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data...”

Data protection – Principles of the GDPR (Article 5)

Lawfulness Fairness and Transparency

- *tell people what you are doing with their personal data and make sure you have a basis for processing in the first place*

Purpose Limitation

- *process personal data for clear purposes and don't then process it for new purposes*

Data Minimisation

- *don't process more personal data than you need to*

Accuracy

- *make sure personal data held is accurate and up to date*

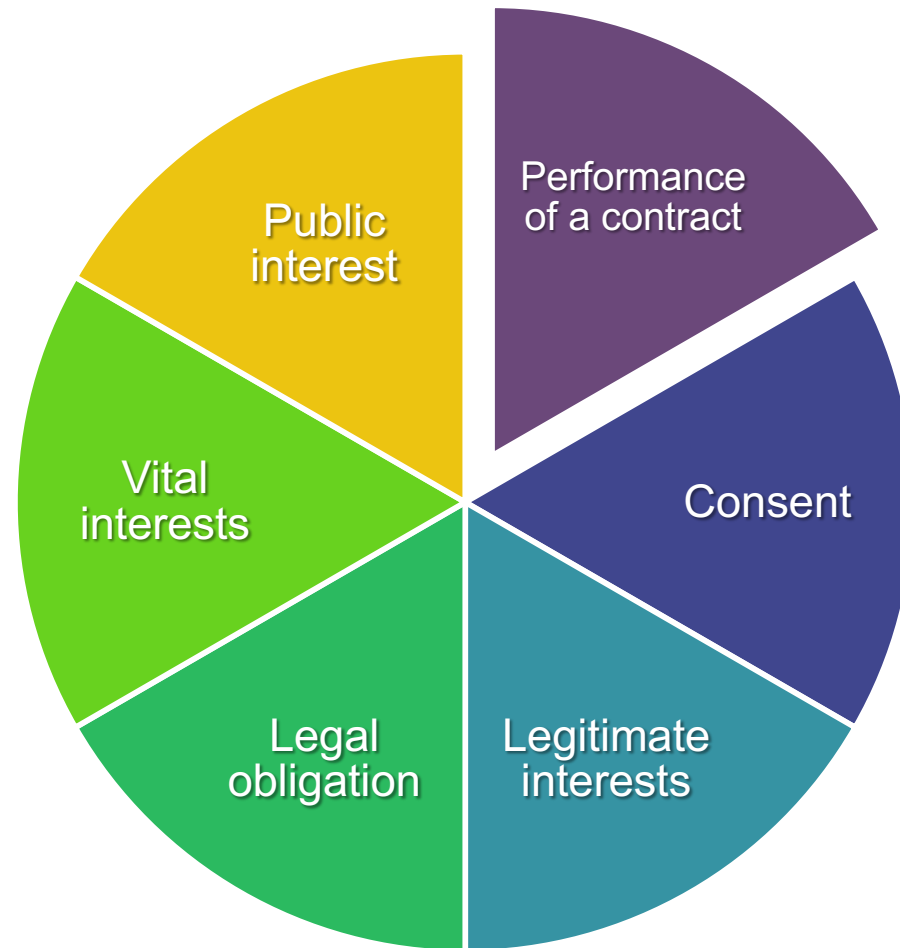
Storage Limitation

- *don't hold personal data for longer than you need to*

Security

- *protect personal data*

Data Protection – Legal bases for processing under GDPR



Data Protection – international transfers



Data protection – cookies and consents to marketing

Privacy and Electronic Communications Regulations 2003

Consent to unsolicited marketing via email, SMS, direct messages on Facebook etc.

- Opt-in consent vs. soft opt in
- Opt-in consent is required for email/SMS marketing, unless:
 - Contact details are obtained during course of sale or negotiation for sale for goods/service
 - marketing relates to your similar goods and services
 - Recipient was provided with a means of refusing marketing when they gave their email address
- Must give a method to unsubscribe in each communication sent.

Data protection – cookies and consents to marketing

Privacy and Electronic Communications Regulations 2003

Cookies (and similar technologies)

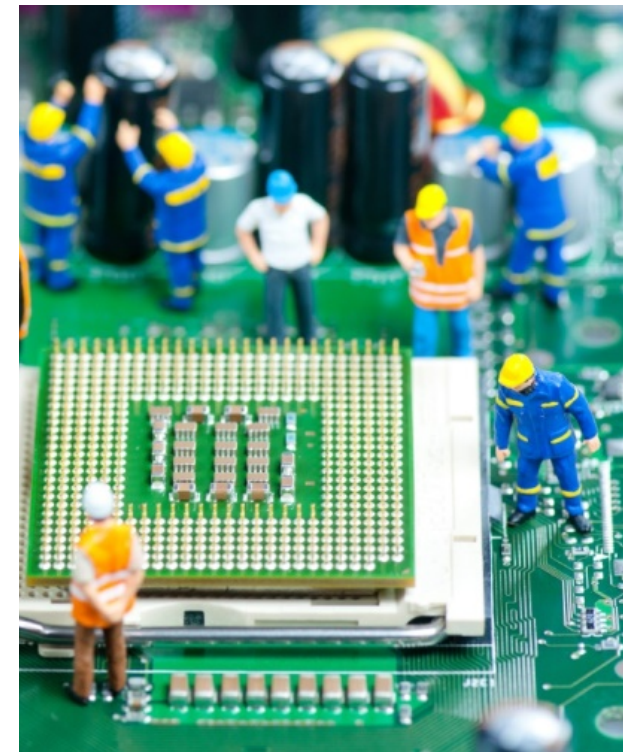
- Consent required to set cookies
- Exception for cookies which are “strictly necessary” (e.g. “add to basket”)
- Must give clear and comprehensive information about cookies



Data Protection – everything is changing...

New privacy and e-communications regulation

- Privacy and Electronic Communications Regulations 2003 to be repealed
- Fines in line with GDPR and extra-territorial effect also
- Changes to cookies
- Privacy settings at browser level
- Still in draft form. Originally intended to come into force with GDPR but that hasn't happened...



Data Protection and RIPA

Regulation of Investigatory Powers Act 2000

Can Bill monitor the private messages users send to each other on his site?

- Criminal offence to intercept communications in the course of their transmission via postal, public or private telecommunications systems
- Exceptions:
 - Consent
 - Lawful authority
 - Lawful Business Practice Regulations:
 - authorises specified interceptions carried out for business purposes (e.g. training purposes)
 - must use all reasonable efforts to inform of the interception

Advertising

- Advertising must be legal, decent, honest and truthful
- CAP Code for non-broadcast ads
- BCAP Code for broadcast ads



Useful websites

You can find more information on specific topics on the following websites:

Black letter law

- www.legislation.gov.uk

Intellectual property

- www.ipo.gov.uk

Data protection, privacy, marketing

- www.ico.org.uk

Useful websites

Advertising

- www.asa.org.uk

Consumer law

- <https://www.gov.uk/government/organisations/competition-and-markets-authority>



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