

**AN ANALYSIS OF LICENSING AGREEMENTS IN RETAIL COMPUTER
PROGRAMS AND
THE EFFECT OF THE CONSUMER PROTECTION ACT**

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INDEX

Chapter 1: Introduction.....	4
The nature of software products and intellectual property law	4
1.1 Background - The Nature of Software Products and Intellectual Property Law... ..	5
1.2 Research Question and Methodology	7
1.3 The Nature of Computer Programs in Copyright Law.....	8
1.3 Delimitations.....	10
Chapter 2: Copyright Act and Common Law	12
2.1 Copyright and Licences of Computer Programs.....	12
2.2 The Nature of Licences	13
2.3 Licences in the Copyright Act.....	17
2.4 The Validity of Licence Agreements.....	19
2.5 Agreements Displayed on the Cover.....	20
2.6 Written Agreements Displayed After Purchase	22
2.7 No Licence Agreement.....	22
2.8 Conclusion	24
Chapter 3: Consumer Protection Act	26
3.1 Introduction to the Consumer Protection Act.....	26
3.2 The Application of the Consumer Protection Act.....	28
3.3 Exclusions.....	32
3.4 The Contents of Agreements	34
3.5 Plain Language	34
3.6 Fair Terms.....	38
3.7 Notice of Terms.....	45
3.8 Prohibited Terms.....	50

3.9 Implied Warranty on Quality	51
3.10 Applicability to Foreign Agreements	55
Chapter 4: Conclusion	
Conclusion	59
Bibliography	66

CHAPTER 1:

Introduction

1.1 Background – The nature of software products and intellectual property law

This dissertation seeks to study the nature and effectivity of licence agreements concluded in respect of retail computer programs after promulgation of the Consumer Protection Act.¹

Copyright falls under the umbrella of intellectual property law. The object of copyright is an idea or concept which has been reduced to material form.² The holder of the copyright in a specific work enjoys certain rights which he alone may exercise in respect of that work. Any other person performing an action restricted by copyright will infringe on the copyright holder's rights and he may, depending on the nature of the work, seek an interdict or claim royalties.³ However, by means of a licence agreement, a copyright holder may grant another person permission to exercise those rights.⁴

The Copyright Act 98 of 1978 has been specifically amended to include computer programs as a specific form work in which copyright can vest.⁵ This dissertation is

¹ Act 68 of 2008 (hereinafter the 'Consumer Protection Act'). A small spelling difference should be taken note of. The US spelling of the word 'licence' is 'license' and in American literature it will appear that way. As such, the terms will be used interchangeably throughout.

² Act 98 of 1978 (hereinafter referred to as the 'Copyright Act') s2.

³ Copyright Act s22, s23.

⁴ Or even to exercise those rights in the place of the copyright holder. This can be done by a so-called "exclusive licence": Copyright Act s25.

⁵ S1 contains the following definition of "computer program": "a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result." S11B describes the rights which fall or accrue to the copyright holder of a computer program as follows: "(a) Reproducing the computer program in any manner or form; (b) publishing the computer program if it was hitherto unpublished; (c) performing the computer program in public;

primarily concerned with the evaluation of licence agreements for computer programs that are distributed to the public *en masse*. These computer programs may be accompanied by a standard form licence agreement which the consumer must assent to in order to make use of the product. It may be displayed to the consumer on the box in which the program is retailed (under a translucent wrapping paper, giving rise to the term “shrink-wrap agreements”),⁶ and it may also be displayed when the computer program is installed onto a computer. In the latter case the consumer will only be allowed to proceed with the installation when the user has by positive action assented to the licence agreement.⁷ There is essentially a dual transaction: there is the purchase at the retailer of the computer program and in addition to it there is a license agreement that the consumer must enter into in order to use the computer program.

With the introduction of the Consumer Protection Act⁸ a number of requirements have been introduced relating to contracts between suppliers and consumers. Specifically, the Consumer Protection Act has been structured in a manner that extends its scope to include computer programs as well as licences in respect of computer programs. This is due to the broad definition of the word “goods”:⁹

(d) broadcasting the computer program; (e) causing the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster; (f) making an adaptation of the computer program; (g) doing, in relation to an adaptation of the computer program, any of the acts specified in relation to the computer program in paragraphs (a) to (e) inclusive; (h) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program.”

⁶ Pistorius T 1991.

⁷ This would, for example, be where the user ticks a box indicating that he has read the information and agrees to it.

⁸ Having its general implementation date on 31 March 2011 as per the Notice to Defer the General Effective Date of the Consumer Protection Act 68 of 2008, 23 September 2010 543:3 (Notices Gazette No. 33581). The Consumer Protection Act was to be implemented incrementally with Chapters 1 and 5, s120, Schedule 2 and any other provision authorising the Minister to issue regulations coming into effect on 24 April 2010. The remaining provisions came into effect on 31 March 2011, as per the aforementioned notice. For further detail, see Nagel CJ 705.

⁹ S1 of the Consumer Protect Act.

“goods’ includes-

- (a) anything marketed for human consumption;
- (b) any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product;
- (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of ‘service’ in this section; and
- (e) gas, water and electricity;

The word ‘licence’ is furthermore defined in the Consumer Protection Act, yet not in the more specialised Copyright Act:

“depending on the context, means the authority, regardless of its specific title or form, issued to a person and in terms of which that person is either-

- (a) authorised in terms of a public regulation to conduct business; or
- (b) authorised by another person to-
 - (i) access any facility or use any goods; or
 - (ii) supply any goods or services;”

In the absence of any other specific definition, the general universal definition as understood by the average consumer will be, for example, “a permit from an authority to own or use something, do a particular thing, or carry on a trade (especially in alcoholic liquors).”¹⁰

Reading the above it is clear then that not only will computer programs be treated as goods in terms of the Consumer Protection Act but so will licences for computer programs. As most consumer protection rules are aimed at the provision of tangible goods to the consumer, such as appliances, and statutory measures often focus on

¹⁰ Pearsall J The Concise Oxford Dictionary 819.

the realities and complications posed by these kinds of goods, the application of the Act to intangible programs and licences will have potentially interesting ramifications as discussed below.

It must however be understood that the Consumer Protection Act will not always apply to license agreements. It is intended to guard only consumer rights and certain persons and agreements are excluded from its protection,¹¹ e.g. the State.¹² Aspects of the CPA discussed will thus not be of universal application.

1.2 Research question and methodology

This dissertation will examine the legal position of the consumer pertaining to license contracts for software products sold in South Africa. In doing so it will firstly consider the position as it exists in the Copyright Act and in the common law. Once it has a clear view we will turn to the Consumer Protection Act and see if and how it has modified the position. It is dealt with separately from the Copyright Act so that the potential problems introduced by it can be highlighted and clearly discussed. Lastly, this study will also examine problems that may be encountered when dealing with licences granted by foreign entities and how South African laws, especially the Consumer Protection Act, may apply to these. To conclude the discussion on methodology, the use of certain words should be addressed. The Consumer Protection Act defines a number of words that are in our common vocabulary but in doing so it has changed their meaning slightly. To accommodate their specific meanings, the word “contract” will be used as it is commonly understood in South African law but later when discussing the Consumer Protection Act the words

¹¹ See paragraph 3.2 below.

¹² S5(2)(a).

“agreement” and “transaction” will be used instead.¹³ It is for the reason of that Act that the word “consumer” will be used throughout this dissertation to refer to the end user,¹⁴ the person who purchases and makes use of a computer program.

1.3 The Nature of Computer Programs in Copyright Law

Before discussing the main research questions in full, it would be useful to consider the nature of a computer program and how we treat it in our legal system although it is not the intention of this dissertation to deal exhaustively with it. It was promised above that the law on copyright would be considered minimally and accordingly only a brief background is sketched. The Copyright Act has been amended to include computer programs as a protected work.¹⁵ A ‘computer program’¹⁶ is: “A set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result.” This definition is not complete as it does not describe the entire operation of what a computer does. The Copyright Act also does not define what a computer is. Resorting to an ordinary dictionary, it is “an electronic device which is capable of receiving information (data) in a particular form and of performing a sequence of operations in accordance with a predetermined but variable set of procedural instructions (program) to produce a

¹³ An agreement as defined by the Consumer Protection Act ‘means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them.’ Importantly, this definition means that even if something is not a contract it will still be an agreement. Relevant to this is the definition of a “transaction” which means: “(a) in respect of a person acting in the ordinary course of business – (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).” For the purposes of this text, the arrangements under s5(6) are inapplicable. They are franchise agreements and agreements for the supply of goods to members of associations or clubs by those clubs.

¹⁴ A popular universal term.

¹⁵ S1 contains the definition of “computer program”. S11B describes the rights which fall to the copyright holder of a computer program. Prior to the introduction of this in the Copyright Amendment Act No 125 of 1992 computer programs were protected as literary works.

¹⁶ S1 of the Copyright Act.

result in the form of information or signals.”¹⁷ This definition is important because it encompasses not only the ordinary desktop computer that we are used to but also smaller devices, such as tablet devices or cell phones. Throughout this text the word computer will be used in the broad terms given in the definition above and it should be understood to also include other devices, such as cell phones, tablets or gaming consoles.

A computer program normally operates on input data which is entered into the computer program and then rendered into output data. The computer program itself is merely the set of instructions that turns the input data into output data.¹⁸ It is important to note that the input data and output data may themselves be different works and also be subjected individually to copyright, for example a photograph used as input data or the layout of the display as output data.¹⁹ A computer game, *in toto*, may have parts of it protected as a computer program and other parts as a cinematograph film.²⁰

The distinction between input data, output data and the computer program is also important as some definitions of the Copyright Act have been amended to exclude

¹⁷ Pearsall J The Concise Oxford Dictionary 294.

¹⁸ De Villiers R “Computer Programs and Copyright: The South African Perspective” (2006) 2 SALJ 315.

¹⁹ De Villiers 315. This has been considered in foreign courts in the matters of *Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd* (1991) 399 JOC (T).

²⁰ In *Golden China TV Game Centre and Others v Nintendo Co* 1997 (1) SA 405 (SCA); [1996] 4 All SA 667 (A) it was held that a video game is protected as a cinematograph film. A cinematograph film excludes in its definition computer programs and in that case it was common cause that although computer programs were employed in the creation of the video game that the game itself is not a computer program. According to Ebersöhn, in line with *dicta* from American courts, it would be appropriate for the program generating the visual displays and accompanying sounds to be protected as a computer program while the visual display should be protected as a cinematograph film.

computer programs from their ambit.²¹ This is significant because when one refers to a licence for a computer program it ought to refer not only to the computer program itself but of necessity to anything else which may be protected as different yet related works.²² With this explained the reader should understand that these licence agreements are not in respect of a single object (a computer program) but in truth for a number of different works in which copyright has vested that are packaged together.

To bring all of the above together, the following should be understood when we discuss licences for computer programs. These programs may be anything from accounting software on a desktop computer to a game played on your cell phone. The licence not only permits you to install the program but also to display images and play music coupled with the program on your computer.

1.4 Delimitations

This dissertation is primarily focused on the law of contract and particularly licence agreements. It is not aimed at discussing copyright law. Aspects from the Copyright Act and its associated body of law will only be dealt with as far as necessary. To further delimit the focus of the dissertation, it focuses only on contracts of adhesion or standard form contracts. As discussed above computer programs may be accompanied by a standard form agreement that must be assented to by the

²¹ Cinematograph film and literary works. It is notable that other jurisdictions, in line with the Berne Convention, protect computer programs as literary works and that before the introduction of the definition of 'computer program' that they were also protected under South African law as literary works; Ebersöhn 113. See also *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 (4) SA 123 (C); *Payen Computers (Pty) Ltd & Others v Rosenstein* 1981 (4) SA 123 (C).

²² In the event that in a licence agreement reference is only made to the computer program itself, it is suggested that this should include the other works incorporated within the program, such as the images displayed on the computer screen.

consumer. Instead of such an agreement it is possible that a bespoke agreement may be concluded between the author of a computer program and a specific user or consumer to regulate the licence for the computer program. These bespoke agreements are not included in the discussion.

CHAPTER 2:

Copyright Act and Common Law

2.1 Copyright and Licences of Computer Programs

Copyright is a form of intellectual property. It has an international character, and its universal regulation can be found within international treaties.²³ The Republic of South Africa, as signatory to these treaties,²⁴ is obliged to promulgate laws to give effect to it. Copyright law in South African law is drawn primarily from statute, specifically the Copyright Act. This national act regulates the manner in which copyright comes into being, in respect of in which “works” copyright may vest, the rights of the copyright holder in respect of the “work” and the manner in which they are protected.²⁵ As will be explained below, if anyone performs certain actions that are reserved for the copyright holder, the copyright holder has certain remedies against that person. An exception exists within the Copyright Act: if a person has a license from the copyright holder, those rights cannot be enforced against him.²⁶ Upon the creation of a computer program with the intention to distribute it to the public, it becomes essential then to grant a licence to use the computer program to the consumer who procures it. Without a licence a person will not be allowed make use of the computer program (e.g. create a copy from the disc or source such as a website to his computer or device).²⁷ The nature of a licence is somewhat nebulous and the term is not currently defined in the Copyright Act. Before delving into the

²³ One of the primary treaties is the Berne Convention for the Protection of Literary and Artistic Works of 1886 and, more recently, the World Intellectual Property Organization Copyright Treaty of 1996. The latter is specifically intended to deal with advances in information technology.

²⁴ Signed in 1928.

²⁵ S6 to 11B of the Copyright Act.

²⁶ S23(2) of the Copyright Act

²⁷ S11B(a) of the Copyright Act.

Copyright Act's specific provisions, in their current amended form, it may be useful to see how the concept of a 'licence' is treated in other sources.

2.2 The Nature of the License

A licence is defined by the Concise Oxford Dictionary as: "a permit from an authority to own or use something, do a particular thing, or carry on a trade (especially in alcoholic liquors)." ²⁸

There has been some debate by authors whether a "licence" is a contract and if so whether a licence will also always by necessity be granted by a contract. At times there has also been some confusion between the two concepts and the courts have not always been careful in their use of language. This study aim to address some of these questions.

It is regrettable that the term licence is no longer defined in the Copyright Act. A definition did exist but was removed when the Act was amended by the Copyright Amendment Act No 125 of 1992. This definition also did not give a broad definition of what a licence is but instead specified acts that could be performed in respect of particular types of works (e.g. literary or musical works) when a person possessed a licence. ²⁹ The general statute that speaks on the subject is the aforementioned Consumer Protection Act which states that a licence:

²⁸ Pearsall J The Concise Oxford Dictionary 819.

²⁹ "licence" 'means a licence granted by or on behalf of the owner or prospective owner of the copyright in a literary, musical or artistic work or in a sound recording or a broadcast, being – (a) in the case of a literary or musical work, a licence to publish the work in a material form or to perform the work or an adaptation thereof in public or to broadcast it or to record it or to cause it to be transmitted in a diffusion service; (b) in the case of an artistic work, a licence to include it or an adaptation thereof in a cinematograph film or in a pre-recorded or live television broadcast or to cause the work or an

“depending on the context, means the authority, regardless of its specific title or form, issued to a person and in terms of which that person is either-

- (a) authorised in terms of a public regulation to conduct business; or
- (b) authorised by another person to-
 - (i) access any facility or use any goods; or
 - (ii) supply any goods or services;”

This definition however mostly holds value when the Consumer Protection Act applies which is not always the case.³⁰

Speres³¹ considers whether or not a licence can be granted in South African law by some way other than by agreement in a binding contract. He compares his viewpoint with that of Dean,³² who supports the view that a licence can be granted by some way other than a contract. This contradicts the view held by AJC Copeling in LAWSA that licences are invariably granted by contract.³³ Speres also considers the court’s view in *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Shelbourne Associates & Others; Century Associates & Others*,³⁴ that a licence is no more than a *pactum de non petendo*. In identifying the difference it is better to have a full view of the following portion of Slomowitz AJ’s judgment:

“Historical analysis reveals that in our law a licence is nothing more than a dispensation which passes no interest in its subject matter. *Kinemas Ltd v African Theatres Ltd* 1928 WLD 100; *Clifford Harris (Pty) Ltd v SGB Building Equipment (Pty) Ltd* 1920 (2) SA 141 (T). In the first of the authorities cited, the applicants for an interdict had been granted the sole and exclusive right to exhibit a film in South

adaptation thereof to be transmitted in a diffusion service; (c) in the case of a broadcast, a licence to rebroadcast it, to record it or to cause it to be transmitted in a diffusion service.’

³⁰ See paragraph 3.3 below.

³¹ Speres J “The Enforceability of Open Source Software Licences: Can Copyright Licences be Granted Non-Contractually” (2009) 21 *SA Merc LJ* 174.

³² Dean O *Handbook of South African Copyright Law* (1987) (revision service 12, 2004).

³³ Copeling AJC Volume 5 Part 2 67, as updated by AJ Smith.

³⁴ 1986 (2) SA 623 (T).

Africa. The owner had, however, given them no proprietary interest in the film. Their petition failed on the ground of a lack of *locus standi* to initiate proceedings against another for infringement of the right. De Waal JP cited with approval the judgment of Cotton LJ in *Heap v Hartley* (1889) 42 ChD 461 that:

“...a licence... is an authority from the person who grants it to the person who receives it, enabling him to do lawfully that which without the licence he could not do.”

In this sense, as [counsel for the appellant] pointed out, the agreement between the licensor and the licensee is no more than a *pactum de non petendo*.”

Speres notes³⁵ that there is nothing in the court case that requires that licences must be granted by contract and that the passage describes what form licences will take when they are contractually granted. I believe that Harms J was merely comparing it with *pactum de non petendo* as they operate similarly. Ordinarily a copyright holder would have an action against a person who performs an action reserved for the copyright holder. A *pactum de non petendo* and a licence would merely have a similar effect in preventing the copyright holder from exercising his rights under the Copyright Act.

Despite the unfortunate comparison with a *pactum de non petendo*³⁶ it appears that Slomowitz AJ's judgment is in accord with what was stated above – a licence is permission to a thing and is not in itself a contract. The comparison between a licence and a *pactum de non petendo* though does indicate that the concepts of licences and contracts are sometimes used interchangeably when dealt with by the courts and it would be preferable if the concepts were separated.

³⁵ Speres 182.

³⁶ See also *Clifford Harris (Pty) Ltd v S G B Building Equipment (Pty) Ltd* 1980 (2) SA 141 (T).

For a further example, as to whether an exclusive licence could be ceded without the licensor's consent, the court made the following *obiter* comment in *Video Rent (Pty) Ltd and Another v Flamingo Film Hire*³⁷:

“In my opinion the type of contractual arrangement in this case *prima facie* does not involve a *delectus personae*. The exclusive licence on the face of it is a pure commercial arrangement which, in the absence of further evidence to show that the personal circumstances are of importance, does not itself suggest that this the kind of case where cession is not allowed. I accordingly hold that the facts do not show that in this case there cannot be a cession of an exclusive licence without the consent of the licensor.”³⁸

This is not however a question that arises frequently. In another decision, *Bestmed Medical Scheme v Board of Healthcare Funders of Southern Africa*,³⁹ where the court considered whether a licence was tacitly granted or not. The court appeared to resolve it purely through the application of contractual principles on when a tacit contract is formed.⁴⁰

Beyond noting the distinction between the contract and the licence, it is Spere's view that in light of the wording of the Copyright Act a strong case can be made out that a

³⁷ 1981 (3) SA 42 (C).

³⁸ Above 50.

³⁹ 2003 BIP 231 (T).

⁴⁰ It does appear however that the court had it mind that it is possible for a licence to be granted other than by way of contract if one considers Mynhard J's words at para 46 “...*daar [is] egter sekere optredes van veral die respondent wat my in elk geval daartoe noop om tot die gevolgtrekking te kom dat daar nie 'n stilswyende kontrak, of lisensie, tot stand gekom het nie*. Although he concluded that there was no tacit agreement, the phrase “...’n stilswyende kontrak of lisensie” implies that existence of a licence without a tacit agreement was possible.

licence can be granted non-contractually, can be supported.⁴¹ Unfortunately he does not provide examples of any other ways in which a licence can be granted.

On a final note, the distinction between licences and licence agreements are amplified by the structure of the Consumer Protection Act below. A licence is defined as a form of goods.⁴² Many of the provisions relate to the supply of goods and the terms and conditions concerning the supply of goods.⁴³ It would be inappropriate to consider that the licence and the licence agreement are both contracts while trying to apply some of its sections, e.g. “S48. (1) A supplier must not— (a) offer to supply, supply, or enter into an agreement to supply, any goods or services (ii) on terms that are unfair, unreasonable or unjust...” Clearly it is intended that licence agreement (the “agreement to supply”) which grants the licence (“any goods”) must not contain terms that are unfair, unreasonable or unjust.

2.3 Licences in the Copyright Act

Generally a licence amounts to permission by the copyright holder to the licensee that he may exercise the copyright holder’s rights in terms of the Copyright Act. Such a licence is not necessarily a contract but it can be regulated by contract.⁴⁴ This can be inferred from s23(1) and (2) of the Copyright Act which provides that copyright is not infringed by a person who has a licence of the copyright owner.

⁴¹ Take note, however, that Spere was arguing for this in support of another type of license: open source software licenses. To summarise, under an open source license, the source code of a computer program is released to the public with a license that it can be modified, copied and redistributed but it must be done while granting others the same license. The argument for the license being granted non-contractually was used to resolve potential conflicts of enforceability of copyright between the original licensor and other persons who ought to have a license but do not as there is no contractual arrangement between them and the original licensor.

⁴² See paragraph 1.1 above.

⁴³ Discussed in chapter 3 below.

⁴⁴ In this respect, consider the following extract of s22(4): “A ... licence ... may be written or oral, or may be inferred from conduct... Provided that ... a licence granted by contract shall not be revoked, ... except as the contract may provide, or by a further contract.”

Licences can in all cases be either exclusive or non-exclusive. The distinction between the two is stated expressly in the Copyright Act. A non-exclusive licence may be written or oral, inferred from conduct and revoked at any time unless otherwise specified in a contract.⁴⁵ By means of a non-exclusive licence one or more consumers may be permitted to exercise any or all of the rights of the copyright holder in respect of a computer program.⁴⁶ Contrasting with this, an exclusive licence authorises the licensee to exercise the copyright-owner's rights to the exclusion of all others, including the owner of the copyright himself.⁴⁷ An exclusive licensee may also enforce the rights under the copyright as if they were assigned to him, something a non-exclusive licensee is unable to do.⁴⁸ Such a licence must be granted in writing.⁴⁹

Before we depart from the Copyright Act, one other development must be noted. An amendment bill has been gazetted for public comment.⁵⁰ Shortly after publication the

⁴⁵ S22(4) of the Copyright Act which states: "A non-exclusive licence to do an act which is subject to copyright may be written or oral, or may be inferred from conduct, and may be revoked at any time: Provided that such a licence granted by contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract."

⁴⁶ S23(1) of the Copyright Act which states: "Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorize."

⁴⁷ The definition of "exclusive licence" in s1 of the Copyright Act.

⁴⁸ S25 of the Copyright Act.

⁴⁹ S22(3).of the Copyright Act: "No ... exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicensor, as the case may be." See also *J K Fulton (Pty) Ltd v Logic Engineering Enterprises (Pty) Ltd and Others* 1983 (1) SA 735 (W) where it was held that an exclusive licence need not grant the licensee the right to perform all of the acts the copyright owner is entitled to but only some of them. The court also interpreted a clause in the contract granting the exclusive licence to manufacture certain products also granted the licence to perform certain acts the copyright owner is entitled to, such as the right to use the copyrighted designs and drawings. It is submitted that the effect of this is that although an exclusive licence cannot be inferred from conduct (whereas a non-exclusive licence can), a person may have a licence to do certain acts ordinarily restricted to the copyright holder.

⁵⁰ Copyright Amendment Bill 2015 Government Gazette 39028:646 27 July 2015.

amendment bill has drawn harsh criticism for being poorly drafted,⁵¹ examples of its blunders including a definition being amended that never existed⁵² or inexplicably introducing the term “creator” when the Copyright Act in its present form refers to “author” and “owner.” While the amendment bill proposes a host of dramatic changes, they are not relevant for this discussion as we are solely concerned with the Copyright Act’s provisions on licences.

2.4 The Validity of Licence Agreements

Although separate concepts, licences and contracts appear to be linked together – often the granting of licence is done through a contract with various stipulations as to how the licence is to be exercised. A valid contract is in general concluded where the following requirements are met:⁵³

1. Consensus between the parties;⁵⁴
2. Capacity to contract;⁵⁵
3. Compliance with prescribed formalities;⁵⁶
4. Legality;⁵⁷ and
5. Possibility and certainty of performances.⁵⁸

Not all contracts are concluded by immediate clearly apparent consensual conduct of the parties. Agreements conferring a licence, referred to as ‘licence agreements’, specifically shrink-wrap licence agreements, were introduced to protect copyrighted

⁵¹ Dean O “DTI Dishes Up A Hopeless Curate’s Egg” (5 August 2015) <http://blogs.sun.ac.za/iplaw/2015/08/05/dti-dishes-up-a-hopeless-curates-egg/> (Accessed 10 August 2015) and also Karjiker S “Let’s Pray for Mediocrity: Another Case of Legislative Diarrhoea” (3 August 2015) <http://blogs.sun.ac.za/iplaw/2015/08/03/lets-pray-for-mediocrity-another-case-of-legislative-diarrhoea/> (Accessed 10 August 2015).

⁵² The definition of “phonogram.”

⁵³ *Hutchison* 6.

⁵⁴ *Hutchison* 13, *Van Wyk* 19 and *Christie* 23.

⁵⁵ *Hutchison* 149.

⁵⁶ *Hutchison* 159, *Van Wyk* 152 and *Christie* 109.

⁵⁷ *Hutchison* 175, *Van Wyk* 191 and *Christie* 351.

⁵⁸ *Hutchison* 205, *Van Wyk* 186 and 221.

computer programs and to deter pirating.⁵⁹ These agreements were often printed on the packaging in which the computer program was shipped and was visible through the translucent wrapping paper, hence the name “Shrink-Wrap” agreement.⁶⁰

In respect of computer programs it is a common occurrence that one is required to expressly accept a licence agreement in order to install it. Of primary concern to us is the non-exclusive licence.⁶¹ These agreements are often done impersonally by way of displaying the agreement to the consumer to which he must assent before he may use the computer program. It may also occur that a person will only see and be informed of the terms of the agreement after purchasing the computer program. When the computer program is installed a licence agreement will be presented to the purchaser on screen. The purchaser must assent to the agreement (commonly by pressing a button indicating acceptance) failing which the computer program will not be installed. Three positions can be discerned from the one above: (a) where the consumer was presented visually and was informed of the full agreement (or had access to the licence agreement) before purchasing the computer program; (b) where the consumer did not see the licence agreement prior to his purchase; and finally (c) where the licence agreement is entirely absent.

2.5 Agreements Displayed on the Cover

Such a contract would of necessity be concluded by conduct between the consumer and the copyright holder. Because the product is usually sold by a retailer who is not an agent of the copyright holder, a licence agreement would have to be entered into

⁵⁹ Pistorius 1991.

⁶⁰ Pistorius 1991; Pistorius 1993.

⁶¹ An exclusive licence would mean that only a single person would be allowed to make use of certain rights. This would be undesirable in a product that is intended to be sold to as many persons as possible.

without the consumer and the copyright holder being in one another's presence or communicating the offer and acceptance to one another. The rules relating to "ticket cases," or contracts of adhesion as they will be referred to in this dissertation, adopted by our law from English law, are capable of resolving such a situation.⁶² This is a simple enquiry involving three questions.⁶³

1. Did the consumer know that there was writing on the ticket?
2. Did the consumer know that the writing related to the terms of a contract?

If either of these questions is answered in the negative, the third question must be asked, namely:

3. Were reasonable steps taken in an attempt to bring the consumer's notice to the agreement?

If the second or third questions are answered in the affirmative then the writing forms part of a contract between the consumer and the copyright holder. Often these ticket cases involve matters where there is an agreement with the intention of escaping liability. There is no reason however why these principles cannot be used to ensure that a contract granting a licence is established between a consumer and a copyright holder.⁶⁴

⁶² Pistorius 1993 6; Van der Merwe 261.

⁶³ *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 (2) SA 717 (C); *King's Care Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N); *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA); *Cape Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA).

⁶⁴ As supported by Pistorius 1993.

2.6 Written Agreements Displayed After Purchase

It poses an unusual problem if the agreement is only displayed after the product was purchased. In this situation the consumer has already purchased the product but when attempting to install he may be required to assent to a further agreement (usually the licence agreement) before the product can be installed. The consumer will usually be requested to click on an object labelled “I agree” to demonstrate his acceptance of the agreement. In the position above, the conclusion of the licence agreement occurred simultaneously with the purchase of the computer program. This licence agreement in this scenario, however, will be concluded a period of time after the purchase of the computer program. One may then wish to enquire as to whether this impacts on the validity of the licence agreement. Certainly, a person who has just purchased a computer program at a retailer will be under the impression that he is permitted to use it without needing to assent to further agreements. The answer to this appears to be unclear at the moment. Conceivably, if he does indicate acceptance, then he will be bound to the agreement.

2.7 No Licence Agreement

In light of the previous distinction drawn between licences and contracts, we may be able to consider the position of software where there is no express licence agreement. The most basic answer would be that there is no licence and accordingly the copyright holder may exercise any of his rights against the person who has/uses his software.⁶⁵ Consider however the situation (as unlikely as it is) where a consumer purchases a computer program and there is no licence agreement to be found in the package or anywhere else. Without a licence agreement, there is no

⁶⁵ S24 of the Copyright Act.

licence and he is vulnerable to the copyright holder. It is not a situation that the Copyright Act deals with.

To resolve this situation we might consider the principles on forming tacit agreements to the tacit granting of a licence. In forming a tacit agreement, consensus may be inferred on a preponderance of probabilities if it is the most plausible in the circumstances.⁶⁶ Such an inference must be drawn from circumstantial evidence.⁶⁷ Consider then that the software is packaged and sold with the end user in mind and destined for his use. It is suggested that the only inference that one can draw from such a scenario is that the suppliers intends that the consumer must receive and use the product. Without a licence the consumer would not be lawfully permitted to use the computer program. If that is the case, then one can further infer that there is consensus for an implied and valid and binding agreement in terms of which the consumer is licensed by the copyright holder to make use of the product. This ensues merely from the transaction concluded with the intent to sell and purchase to use.

⁶⁶ *Mühlmann v Mühlmann* 1984 (3) SA 102 (A); *Tor Industries (Pty) Ltd v Gee-Six Superweld CC And Others* 2001 (2) SA 146 (W) and *Bezuidenhout v Otto And Others* 1996 (3) SA 339 (W); See however Van Der Merwe 129 fn 2 where he states that there is another approach. This approach differs in that the inferences must be the only plausible one that can be drawn, not merely the most probable. See here *Standard Bank of SA Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A); *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed and Hurwitz v Vornier Investments (Pty) Ltd* 1984 (3) SA 155 (A); *Mühlmann v Mühlmann* 1981 (4) SA 632 (W) as well as *Kropman and Others NNO v Nysschen* 1999 (2) SA 567 (T) and *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd* 2001 (1) SA 313 (C) ([2000] 4 All SA 412). It is not entirely clear which approach is correct. In *Mühlmann v Mühlmann* the matter was considered by the appellate and they rejected the court a quo's view that the inference had to be only one that could be drawn. The court associated itself with the view that it was too high a requirement and that it was sufficient of it could be shown that consenses was the most probable inference that could be drawn. Regrettably cases such as *Muller v Pam Snyman Eiendomskonsultant* do not appear to cite *Mühlmann v Mühlmann* and rely on the earlier (conflicting) judgment in *Standard Bank of SA Ltd and Another v Ocean Commodities Inc*. Van der Merwe in his text does not make mention of the case of *Mühlmann* either which is unfortunate as it is the more recent appellate decision.

⁶⁷ *Tor Industries (Pty) Ltd v Gee-Six Superweld CC And Others* 2001 (2) SA 146 (W); *Bezuidenhout v Otto and Others* 1996 (3) SA 339 (W).

An odd situation that can arise, in no small part due to the “protection” offered by the Consumer Protection as will be discussed below, is that it is possible that the agreement may be declared void. This is not a situation that the law, as it is currently written, can deal with. With the agreement that grants the licence falling away, presumably the licence itself will also fall away. This will, as mentioned above, mean that the consumer is vulnerable to the remedies of the copyright holder.

2.8 Conclusion

Before considering how the Consumer Protection Act has impacted on licence contracts, it is helpful to understand the relevant concepts. This will assist when determining whether its provisions have a benign or malign impact on this part of the law. Most importantly, as will be discussed in full in the next chapter, it does not affect every licence agreement that is concluded and for those agreements the law remains unchanged.

When dealing with computer programs, it must always be remembered that the copyright holder has certain rights relating to the use of it that can be enforced against others. By granting another person a licence, he essentially grants that other person permission to make use of the computer program. As was argued above, the licence and the licence agreement are separate concepts and the licence agreement is the vehicle by which a person receives a licence.

For this text, we are concerned with licence agreements that are granted impersonally through contracts of adhesion (so called “ticket cases”). This is a valid way for the licence agreements to be granted. How these agreements are dealt with

may vary depending on when it is displayed to the consumer. It is generally better that the licence agreement be displayed before the purchase of the computer program to ensure that it is both valid and binding.

With these concepts explained, we now turn to consider the Consumer Protection Act.

CHAPTER 3:

Consumer Protection Act

3.1 Introduction to the Consumer Protection Act

The Consumer Protection Act intends to guard consumers against exploitation.⁶⁸ As mentioned in the introduction to this dissertation, it contains unique terminology and language that needs to be understood by the average consumer. Most of these terms will be explained below when examining the scope of the Consumer Protection Act's application to licence agreements. At the outset it should be noted that the provisions in the Consumer Protection Act appear to have been drafted with corporeal goods in mind and not intellectual property. This will be particularly confusing when we consider the nature of the licence, which is at best a permission by a copyright holder to exercise some of the holder's rights.⁶⁹

The Consumer Protection Act contains numerous provisions dealing with aspects such as the conduct of suppliers towards consumers,⁷⁰ the contents of agreements with consumers⁷¹ and consumer rights that apply by operation of law in addition to those that may be contained within the agreements.⁷² Not all of these are strictly within the purview of this dissertation, such as the required conduct of suppliers. These will not be dealt with only insofar as they may impact on the validity of an

⁶⁸ The preamble of that Consumer Protection Act.

⁶⁹ *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Shelbourne Associates & Others; Century Associates & Others* 1986 (2) SA 623 (T).

⁷⁰ For example, restrictions on unwanted direct marketing (s11), bait marketing (s30) or negative option marketing (s31).

⁷¹ Certain terms may not be included in an agreement (s51) and for others it may be required that they be drawn to the attention of the consumer in a conspicuous fashion (s49).

⁷² Such as a statutory warranty on the quality of the goods (s56).

agreement.⁷³ However other aspects such as the rights of consumers *vis-à-vis* suppliers will be examined more thoroughly.

The contents of the Consumer Protection Act will be dealt with in the following sequence:

- (1) The application of the Consumer Protection Act on computer programs, licences and licence agreements. It will be argued that its provisions apply both to computer programs and also to their licences as “goods”. The situations when the Consumer Protection Act applies will also be examined, e.g. who qualifies as a “consumer” or “supplier”.
- (2) The requirements imposed by the Consumer Protection Act on the contents and format of agreements.
- (3) The statutory implied warranty on the quality of goods.⁷⁴
- (4) The specific conduct of the supplier that impacts on the licence agreement.
- (5) The extraterritorial application of the Consumer Protection Act to agreements.

⁷³ For example, consumers have a right to rescind an agreement resulting from direct marketing within 5 days (s16).

⁷⁴ Relevant to the warranty on the quality of goods, the producer, importer, distributor or retailer of any goods is liable for any harm caused by *inter alia* the supply of unsafe goods or a defect in the goods (s61). The general tenor of s61 is that the consumer possesses a claim when harm is caused by goods. The damages for which a person can be held liable for include amongst other things death, injury or illness of a natural person; any loss or physical damage to property, irrespective of whether it is movable or immovable; or economic loss arising from the aforementioned damage. Although this may go wider than what one would ordinarily be able to claim in the law of contract, the sections dealing with claims for damages are rather an issue for the law of delict and go beyond the intended ambit of this text.

3.2 The Application of the Consumer Protection Act

The Consumer Protection Act applies to every transaction⁷⁵ occurring within the Republic and to goods or services that are supplied or performed in terms of a transaction to which it applies,⁷⁶ subject however to the provisions discussed below.

A ‘transaction’ is broadly defined as:

- (a) in respect of a person acting in the ordinary course of business—
 - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
 - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
 - (iii) the performance by, or at the direction of, that person of any services or at the direction of a consumer for consideration; or
- (b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a);⁷⁷

⁷⁵ S1 defines a transaction “(a) in respect of a person acting in the ordinary course of business – (a) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration...” Note that the expression “agreement” is further defined as “an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them.” Ordinarily a contract is based on consensus between the parties and in the alternative on a reasonable reliance (See *Van der Merwe* 19 as well as *Christie* 24). It is my view that even if the requirements for a valid contract are not met it may still constitute an “agreement” for the purposes of this Act. This enables an aggrieved consumer to still use any remedies he may be entitled to under this Act even if he is not entitled to the ordinary contractual remedies.

⁷⁶ Take note however, from the definition of “transaction” that it only applies when a person acts “in the ordinary course of business”. This then limits its ambit to persons who make the supply of goods and services their business, e.g. retailers. Although the Consumer Protection Act protects both natural and juristic persons, in s6(2) it is stated that it does not protect the State or juristic persons whose annual turnover exceeds a certain value. It also does not apply to credit agreements under the National Credit Act 34 of 2005, employment contracts or collective bargaining agreements and collective agreements under the Constitution and the Labour Relations Act 66 of 1995.

⁷⁷ S5(6) lists the following interactions: For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act: (a) The supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity; (b) a solicitation of offers to enter into a franchise agreement; (c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee; (d) a franchise agreement or an agreement supplementary to a franchise agreement; and (e) the supply of any goods or services to a franchisee in terms of a franchise agreement.

The relevance of the Consumer Protection Act becomes clear when we examine the definition of “goods” in s1, which includes:

“...(c) any literature, music, photograph, motion picture, game, information, data , software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product.”

From this it is moot that not only are software products considered to a “goods,” but so are the licences in respect of them.⁷⁸ The Consumer Protection Act is framed in the language of what the consumer has a right to, and broadly provides for additional rights for a consumer in various situations in respect of described goods.

This leads us to ask who may be regarded as a “consumer” and entitled to these rights. A “consumer”⁷⁹

“in respect of any particular goods or services, means –

(a) a person to whom those particular goods or services are marketed⁸⁰ in the ordinary course of business

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by s 5(2)⁸¹ or in terms of s 5(3)⁸²

(c) if the context so requires or permits, a user of those particular services, irrespective of whether that user, recipient or beneficiary was a party to the transaction concerning the supply of those particular goods or services...”

Ordinarily our law holds to the principle of contractual privity; a party to a contract may not enforce his rights against a person who is not a party to a contract. Likewise

⁷⁸ For convenience sake, the definition of a “license” is repeated again in this part of the discussion. “...depending on the context, means the authority, regardless of its specific title or form, issued to a person and in terms of which that person is either - (a) authorised in terms of a public regulation to conduct business; or (b) authorised by another person to - (i) access any facility or use any goods; or (ii) supply any goods or services.”

⁷⁹ S1 of the Consumer Protection Act.

⁸⁰ S1 defines market “when used as a verb, means to ... supply any goods...”

⁸¹ There are a variety of exemptions listed here, each very specific (e.g. when goods are supplied to the state or services that are supplied under an employment contract).

⁸² This section allows a regulatory authority to apply to the Minister for industry-wide exemptions from the application of the Act.

a person who is not a party to a contract has no rights under that contract.⁸³ The Consumer Protection Act therefore extends its protection when the consumer has directly entered into a transaction or when it is lower on the supply chain. This extended protection is sometimes directly mentioned.⁸⁴ For example, where a manufacturer sells a product to a retailer, and the retailer sells the product to a consumer. If the product is found to be defective, the consumer may wish to return it.⁸⁵ By paragraph (c) of the definition of a “consumer”, he may return it to the manufacturer (i.e. a supplier) even though the consumer was not a direct party to the agreement between the retailer and the manufacturer. The ultimate effect of this is that Consumer Protection Act has a very broad application as it even provides for a deviation from the age-old common law principle of privity.

One last aspect that must be discussed in this context is the dual nature of the procurement transaction, as it is important in the subsequent discussion of the interpretation of certain provisions. The effect of the dual transaction in the sale of computer software, is that it constitutes a purchase and sale of the goods between the consumer and the retailer, as well as the licence agreement between the consumer and the copyright holder for application and use of the goods. We must be certain that the Consumer Protection Act applies to not only the purchase and sale of the goods, but also to the license agreement.

In this context, one should note that some sections of the Consumer Protection Act deal with the “supply” of goods and services. This means:

⁸³ Christie 269; except for a *stipulatio alteri*, which is not relevant in this discussion.

⁸⁴ See for example s56(1) where the producer or importer, the distributor and retailer each warrant that the goods comply with certain standards.

⁸⁵ As he would be entitled to in terms of s55(2).

“when used as a verb—

- (a) in relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration...

With the purchase and sale agreement, in light of the definition of goods including software and licences, there can be no doubt that the goods are “supplied”. This is not so clear with the licence agreement for software when it is purchased at the retail store. To supply the goods, one must do so for consideration. In terms of the licence agreement the copyright holder grants the consumer a licence but it is possible that he does not, in terms of the licence agreement, receive anything from the consumer at all. He will have perhaps received his consideration when the package moved through the supply chain long before it ever reached the consumer. The question arises whether that will be enough to satisfy the requirements of the definition of “supply” for purposes of the Act.

If one interprets it literally, that may well be the case. However, the Consumer Protection Act must be interpreted in a way that gives universal effect to its purpose and policy.⁸⁶ To quote a few sections that address this:

The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by:⁸⁷

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- ...
- (d) protecting consumers from—

⁸⁶ S2(1).

⁸⁷ S3(1).

- (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
- (ii) deceptive, misleading, unfair or fraudulent conduct;

The Act's aims would clearly be frustrated if it could apply its protective provisions to only part of the total interaction with the consumer and the suppliers. It must also be noted that the definition of "supply" does not state that the goods must be supplied to the consumer directly. They must merely be sold, hired, rented or exchanged in the ordinary course of business. This could then be anyone, including a person further down in the supply chain.

It is therefore suggested that licence agreements should be considered to effect the "supply" of the licence to the consumer. This approach will be also followed subsequently in this dissertation. When a section of the Consumer Protection Act refers to a supplier or to the supply of goods, it will be assumed to also include the licence agreement as a form of supply of the licence.

3.3 Exclusions

The Consumer Protection Act is intended to protect only ordinary consumers and not large businesses or entities. There are a number of exclusions found in sections 5(2), (3) and (4). In terms of section 5(2) the Consumer Protection Act will not apply where:

1. goods are supplied to the State;⁸⁸
2. the consumer is a juristic person with an annual turnover or net asset value of over R2 million;⁸⁹

⁸⁸ S5(2)(a).

⁸⁹ S5(2)(b) read with Determination of Threshold in terms of the Consumer Act, 2008 (Act No. 68 of 2008) Government Gazette 294:3 (Notices Gazette No. 34141).

3. the transaction constitutes a credit agreement under the National Credit Act 34 of 2005;⁹⁰
4. services are to be supplied under an employment contract;⁹¹
5. effect is given to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act No 66 of 1995;⁹² or
6. effect is given to a collective agreement under the Labour Relations Act No 66 of 1995.⁹³

The most important of these are the first two. The Consumer Protection Act will not protect large businesses or the State. When we consider that every computer will require an operating system and some additional computer programs to function, the State and large businesses are no doubt significant consumers of computer software. Beyond these, under section 5(3) and (4) a regulatory authority may apply for an industry wide exemption from one or more provisions of the Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation or any treaty, international law, convention or protocol. The Minister may then by notice in the Government Gazette, after receiving the advice of the Consumer Protection Commission, grant such an exemption only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of the Consumer Protection Act at least as well as its provisions and subject it to any limits or conditions necessary to ensure the achievement of the purposes of this Act. As of this date, no such exemption appears to have been granted in respect of computer programs and licences.

⁹⁰ S5(2)(d).

⁹¹ S5(2)(e).

⁹² S5(2)(f).

⁹³ S5(2)(g).

3.4 The Contents of Agreements

The Consumer Protection Act has been drafted with the ideal in mind to render the phrasing of agreements with consumers more legible and to prevent onerous unexpected terms.⁹⁴ The Act requires provisions to be plain and understandable, thus comprehensible for the average consumer.⁹⁵

Part of the purpose of the Consumer Protection Act is to improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs.⁹⁶ To give effect to this desire a number of sections influence not only the terms that may be included in a contract but also whether and how attention should be drawn to them. The following paragraphs will be dedicated to its prescripts on the content and appearance of agreements, and are relevant where a consumer purchases the goods as explained above.

3.5 Plain Language

The bulk of Part D of the Consumer Protection Act deals a variety of titbits of information that must be disclosed to the consumer, how they must be disclosed and the records that must be kept.⁹⁷ Although they can be relevant to the sale of computer software, this dissertation's focus is on the licence agreement and will thus concentrate solely on requirement that information published when concluding the dual transaction of purchasing the goods and entering into the licence agreement

⁹⁴ Gouws M 81.

⁹⁵ S22.

⁹⁶ The preamble of the Consumer Protection Act.

⁹⁷ These include *inter alia* the disclosure of the price goods, product labelling and trade description, disclosure of reconditioned or gray market goods and disclosures by intermediaries.

must be in plain and understandable language.⁹⁸ Although the former may in most cases be a wordless transaction at a retail store the latter will invariably be a written agreement and it is with this that the study is concerned with.⁹⁹

According to the Consumer Protection Act Part D the consumer has the right to disclosure of information in plain and understandable language. It specifies that any notice, document or visual representation that is required in law to be produced, provided or displayed to the consumer, to be in the prescribed format or, if no format is prescribed, in plain language.¹⁰⁰ Conversely, on a plain reading of the CPA, if a document is not required in law and has no prescribed format, it is also not necessary that it must be done in plain language.¹⁰¹ See section 22(1)(b); some authors interpret this section as pertaining to general “information” disclosed, irrespective of formality requirements, so including informal disclosures.¹⁰²

Not every agreement will necessarily be required to be in plain language. This begs the question then in which instances will it be required that a licence agreement must be in plain language. There are a few instances where throughout the Consumer Protection Act and the Copyright Act that can be identified and they are listed below. It bears to be reiterated that the plain language requirement only arises in the following instances where the Consumer Protection Act as a whole applies.

⁹⁸ S22.

⁹⁹ The nature of the dual transaction is discussed in paragraph 1.1 and paragraph 3.2 above.

¹⁰⁰ See also Jacobs W, Stoop P & van Niekerk R 330 as well as PN Stoop and C Chürr 529. S22(1). It states in full: “The producer of a notice, document or visual representation that is required, in terms of this Act or any other law, to be produced, provided or displayed to a consumer must produce, provide or display that notice, document or visual representation— (a) in the form prescribed in terms of this Act or any other legislation, if any, for that notice, document or visual representation; or (b) in plain language, if no form has been prescribed for that notice, document or visual representation.”

¹⁰¹ See also PN Stoop and C Chürr 529 at paragraph 6, when discussing section 22(1): “Therefore, this section only applies to notices required by legislation, visual representations and written agreements, and not to oral agreements.

¹⁰² PN Stoop and C Chürr 527.

1. When an agreement is written, whether required by the CPA or made voluntarily, it must comply with the plain language requirements. Invariably, contracts of adhesion (such as licence agreements) will be in writing and must therefore be in plain language.¹⁰³
2. It is generally not required that licence agreements must be in writing and they can be concluded orally.¹⁰⁴ However, when it is an exclusive licence it must be in writing¹⁰⁵ and therefore in plain language.
3. S50 of the Consumer Protection Act allows the Minister to prescribe categories of consumer agreements that are required to be in writing. To date no such prescriptions have been made.
4. Certain provisions in an agreement must be written in plain language.¹⁰⁶ These are those that purport to limit in any way the risk or liability of the supplier or any other person; constitute an assumption of risk or liability by the consumer; impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or be an acknowledgement of any fact by the consumer.

In section 22(1) the Consumer Protection Act does go into some detail into what will constitute plain language:

¹⁰³ S50(2)(b)(i). See however the argument by Gouws M at page 85 that this requirement only applies where the agreement is signed by the consumer, supplier or both. If true this would pose a problem for contracts of adhesion which would not automatically need to comply with the plain language requirements of the CPA. With respect to the learned author, I believe that his argument is predicated on a misreading of s50(2)(a). He states at page 86 “s50(2)(a)... provides that the plain language requirement will apply to a written consumer agreement, whether or not the consumer signs the agreement...” This indicates, he argues, that an agreement signed by the consumer and supplier is contemplated. In full, s50(2)(a) states “If a consumer agreement between a supplier and a consumer is in writing, whether as required by this Act or voluntarily – (a) it applies irrespective of whether or not the consumer signs the agreement...” It is my belief that the pronoun “it” refers to the previous noun “agreement” and that the section means that an agreement will apply between consumer and supplier even if unsigned by the consumer. I believe that the legislature intended to include contracts of adhesion in this way and to bind them by the further requirements of S50(2), such as those that these agreements must be drafted in plain language and a copy must be made available to the consumer.

¹⁰⁴ See s22(4) of the Copyright Act: “A non-exclusive licence to do an act which is subject to copyright may be written or oral...”

¹⁰⁵ Section 22(3) of the Copyright Act.

¹⁰⁶ S49(3).

“if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to—

(a) the context, comprehensiveness and consistency of the notice, document or visual representation;

(b) the organisation, form and style of the notice, document or visual representation;

(c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and

(d) the use of any illustrations, examples, headings or other aids to reading and understanding.”

In addition to the above, guidelines may be published by the Consumer Protection Commission for methods on assessing whether the above requirements are met.¹⁰⁷

Plain language, therefore, is determined by whether a consumer may be expected to understand the document by considering it as a whole.¹⁰⁸ This is not merely any consumer but one for whom the document is intended and also one who may use the relevant goods.¹⁰⁹ I suggest that when this is applied to computer programs, it will be determined from the point of view of someone who is at least somewhat computer literate. Plain language is not a novel concept and has been dealt by academics and foreign law-makers previously, guidelines being suggested on how to draft in it.¹¹⁰ Certain features have been identified as being generally present:¹¹¹ semantic clarity, coherence, a “features” standard and legibility. As the CPA does not offer practical advice in plain language drafting, external sources will have to be consulted.¹¹²

¹⁰⁷ S22(3). It does not appear however that this has yet been done.

¹⁰⁸ PN Stoop and C Chürr 530.

¹⁰⁹ S22(1).

¹¹⁰ Newman S 637.

¹¹¹ Ross S M 331; Gouws M 86.

¹¹² See Newman S 637, Gouws M at page 91 or PN Stoop and C Chürr at page 530 for some suggested techniques.

3.6 Fair Terms

Part G¹¹³ of the Consumer Protection Act deals with the “right to fair, just and reasonable terms and conditions.” It prohibits unfair, unjust or unreasonable terms,¹¹⁴ requires that attention be drawn to certain terms and conditions¹¹⁵ and prohibits other terms and conditions.¹¹⁶ Each aspect will be addressed below *seriatim*.

Section 48(1) states:

A supplier must not—

- (a) offer to supply, supply, or enter into an agreement to supply, any goods or services—
 - (i) at a price that is unfair, unreasonable or unjust; or
 - (ii) on terms that are unfair, unreasonable or unjust;
- (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
- (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
 - (i) to waive any rights;
 - (ii) assume any obligation; or
 - (iii) waive any liability of the supplier,on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

As was argued above in paragraph 3.2, these provisions will apply to both the sale of the software and to the licence agreement. When trying to determine the justness of

¹¹³ In addition to those mentioned below, s50 in Part G also allows the Minister to prescribe categories of consumer agreements that must be in writing together with regulation on its record keeping.

¹¹⁴ S48.

¹¹⁵ S49.

¹¹⁶ S51.

terms and conditions, the Consumer Protection Act has provided some guidelines to assist. These are found in section 48(2):

Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—

- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
- (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
- (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
- (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—
 - (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
 - (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

The sections above appear to have been introduced to combat unfair terms that one sometimes finds in standard form contracts. Standard form contracts are “...contracts that are drafted in advance by the supplier of goods or services and presented to the consumer on a “take-it-or-leave-it” basis, thus eliminating opportunity for arm’s length negotiations. They contain a common stock of contract terms that tend to be weighted heavily in favour of the supplier and to operate to limit or exclude the consumer’s normal contractual rights and the supplier’s normal contractual obligations and liabilities.”¹¹⁷ As contracts of adhesion, the licence agreements we deal with here, will always be drafted in advance and displayed to the consumer without personal interaction, they will always be standard form contracts.

¹¹⁷ *Barkhuizen v Napier* (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) paragraph 135.

Prior to the introduction of this section our courts have wrestled on multiple occasions on how to deal with unfair terms in contracts¹¹⁸ and it was ultimately suggested by the Law Commission that a statutory solution should be implemented.¹¹⁹

The contents of the sections speak for themselves and will not be restated. We will only consider those aspects that may have a peculiar impact on licence agreements. When we consider that a licence agreement exists to manage the licence of the consumer to use the computer program, it may, as a matter of logic, deal with diverse aspects such as how the computer program is to be used and when the licence may be terminated. Licences are not by necessity perpetual.¹²⁰ All of these will have to accord with the principles above, meaning that they cannot be excessively one-sided in favour of the copyright holder or so adverse to the consumer as to be considered inequitable.

Prices must also be fair, just and reasonable.¹²¹ In contrast with the above exposition on fair, just and reasonable terms and conditions, the Consumer Protection Act does not give a similar indication on when prices will be unfair, unjust or unreasonable. This makes the requirement somewhat difficult to apply to software which lacks a material cost. The packaging, which has a material cost that can be easily

¹¹⁸ For example not enforcing certain terms as they are contrary to public policy. See here *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 4 SA 847 (A); *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) and *Barkhuizen v Napier* (5) SA 323 (CC); 2007 (7) BCLR 691 (CC). Contrasting with those views, however, see *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).

¹¹⁹ *Jacobs W, Stoop P & van Niekerk* R 354.

¹²⁰ Licenses can be for fixed terms, such as a year. They may also endure for the life of a specific version of the computer program and expire on the release of (or do not apply to) subsequent versions.

¹²¹ 48(1)(a)(i).

determined, is not the object of the sale and will be minimal. The software (the reproduction of which is only as expensive as its packaging) is the object. The true cost of the computer program is measured by the time, the effort, the salaries of the individuals who laboured for months or years to create it. No individual can bear the cost of the creation of the computer program but it can be broken down into the cheaper distribution packages (and individual instances can be even virtually costless if the computer program is distributed via the Internet). All of these factors are worth considering when trying to determine what would constitute a “fair, just and reasonable price.” These factors will lead to a complex calculation having to be made and it will not be easy to determine what would be a fair price. While the Consumer Protection Act does not generally give an indication on how to arrive at a fair price, later, when discussing remedies it does mention some factors that must be considered by a court when making certain orders¹²² and some of these are relevant to determining a fair price.¹²³ Those factors however only come into play in the specific scenario where the allegation is made before a court that the price is unfair, unreasonable or unjust.¹²⁴ It is uncertain then if they are to be used when enforcement actions are taken by other bodies.¹²⁵

It was originally intended by the legislature that the courts alone would have the jurisdiction to resolve contractual disputes.¹²⁶ In the event that a term or condition is

¹²² S52(2).

¹²³ These include the fair value of the goods or services in question the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and (j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.

¹²⁴ S52(1).

¹²⁵ See for example S100 which allows the National Consumer Commission to issue compliance notices.

¹²⁶ Naudé T 2010 525.

unjust, the Consumer Protection Act has empowered the court¹²⁷ to make a diverse number of orders.¹²⁸ Naudé argues that it is not entirely clear that the courts alone will have that jurisdiction and that it may be possible for consumer courts to do so as well. Section 73 allows the National Consumer Commission to refer a matter to a consumer court where it is found a person has engaged in prohibited conduct. Prohibited conduct is further defined as “an act or omission in contravention of this Act”.¹²⁹ As a matter of logic, including unfair, unreasonable or unjust terms in an agreement will be an act in contravention of the Consumer Protection Act. One is inclined to agree with Naudé’s view then that it is not entirely clear that only the courts may resolve contractual disputes.

When dealing with such a disputes and the potential orders it may make, the court must consider various factors.¹³⁰ The court is empowered in section 52(3):

¹²⁷ The term “court” is defined only with the statement “does not include the consumer court”. A “consumer court” further means “a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation”. Note that the system of courts are established in the s166 of the Constitution of the Republic of South Africa of 1996 as the Constitutional Court; the Supreme Court of Appeal; the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; the Magistrates’ Courts; and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts. Any of these bodies will therefore have the powers discussed in s52.

¹²⁸ S52(1) to (3). Note, however, that these orders can only be made if the Consumer Protection Act does not otherwise provide for a sufficient remedy.

¹²⁹ S1.

¹³⁰ These are listed in s52(2) as follows: (a) the fair value of the goods or services in question; (b) the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position; (c) those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether this Act was in force at that time; (d) the conduct of the supplier and the consumer, respectively; (e) whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation; (f) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier; (g) the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22; (h) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any— (i) custom of trade; and (ii) any previous dealings between the parties; (i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and (j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.

“If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may—

- (a) make a declaration to that effect; and
- (b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order—
 - (i) to restore money or property to the consumer;
 - (ii) to compensate the consumer for losses or expenses relating to—
 - (aa) the transaction or agreement; or
 - (bb) the proceedings of the court; and
 - (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier’s conduct.

This clearly goes far beyond what a court might under its inherent jurisdiction be able to do under common law.

Ordinarily, where a contract does not reflect the true common intention of the parties, the court can correct the document through rectification.¹³¹ This is not an inherent jurisdiction of courts and will only be the case where one of the parties applies for rectification, and meets the burden of proof to succeed. With rectification, it is not the contract that is altered but in fact the document that expresses the contract. When seeking rectification, a party needs to establish that as a result of a mistake the document does not reflect the true common intention of the parties, and then prove how the document should be amended in order to achieve the common intention. The court will then alter the document so as to reflect that true intention of the parties.¹³²

¹³¹ Van der Merwe 178.

¹³² Van der Merwe 179.

In contrast, section 52(3) grants the court far wider powers. It may make an order that money or property must be restored to the consumer.¹³³ This too is broader than is normally permitted in the common law. Restitution will normally only take place after a contract is cancelled or declared void.¹³⁴ Such an order will likely give effect to the contents of section 48(1)(a)(i) of the CPA which regulates the fairness of the price. The court may also make an order to compensate the consumer for losses or expenses relating to the transaction or the agreement or proceedings in court. How the losses must be calculated is not mentioned. The latter provision, to compensate the consumer for the cost of court proceedings, is from a procedural point of view bizarre. Ordinarily in court proceedings the court may award costs to a party.¹³⁵ It is unclear what the intended effect of this last provision is and it appears to be redundant.

Lastly, it may require the supplier to amend any practice, form or document. It does not appear that the court is empowered to alter the terms or conditions themselves, though they may be unjust. The fact that this section enables a court to order the supplier to alter a document should also not lead one to believe that the court may amend the agreement or transaction embodied in the document.

At the present time, literature on this point of the Consumer Protection Act is somewhat sparse and it will take some time for it to receive attention from the courts.

¹³³ Notably, it does not state against whom such an order made, whether against the supplier or some other person.

¹³⁴ Van der Merwe 115, 120 and 354. See also *Johnson v Jainodien and Another* 1982 (4) SA 599 (C), *Probert v Baker* 1983 (3) SA 229 (D), *Baker v Probert* 1985 (3) SA 429 (A) *Tweedie and Another v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) and *Masters v Thain t/a Inahaca Safaris* 2000 (1) SA 467 (W).

¹³⁵ See for example s48(d) of the Magistrates' Court Act 32 of 1944.

Although the Consumer Protection Act was signed in 2008, it was only implemented in 31 March 2011.¹³⁶ By way of example, a casual glance at the pronouncements of the National Consumer Tribunal¹³⁷ will reveal that numerous judgments still deal with contracts that were entered into before the implementation of the Consumer Protection Act and are dealt with on that basis.¹³⁸

This also means that there are not many resources (other than the Act itself) for other authors to draw on. Jacobs et al discusses this part of the Consumer Protection Act, but their primary source is the Act itself. Naudé provides an insightful discussion on the potential efficacy of new changes, but does so by comparing it to statutory regimes in other countries.

It will take some time for the courts to come to terms with new (and broad) powers that they have been granted.

3.7 Notice of Terms

Beyond the requirements that terms must be fair and reasonable, certain types of terms and conditions must be drawn to the attention of the Consumer if they are included. These are specifically exemption clauses where the supplier seeks to limit his liability for harm suffered by the consumer.¹³⁹ Besides drawing attention to the

¹³⁶ See p5 fn 8 above for further detail on its implementation.

¹³⁷ Accessible from their website at <http://www.thenct.org.za/>. (last accessed on 15 August 2015).

¹³⁸ See for example *Mahlangu v Club Leisure Development (Pty) Ltd* Case No: NCT/13675/2014/75(1), *Ngcwabe v Artoclox (Pty) Ltd t/a Fastway Couriers (Johannesburg)* Case No: NCT/8256/2013/75 (1)(b) and *Farm Yard v The National Consumer Commission* Case No: NCT/6013/2012/60(3) & 101(1).

¹³⁹ This is contained in 49(1) which states: “Any notice to consumers or provision of a consumer agreement that purports to— (a) limit in any way the risk or liability of the supplier or any other person; (b) constitute an assumption of risk or liability by the consumer; (c) impose an obligation on

possibility that liability may be excluded, the supplier must also draw attention to unusual risks that the consumer could not reasonably expect and may result in serious injury or death.¹⁴⁰ Lastly, and most importantly, these exemption clauses must be drawn to the attention of the consumer at an early stage:

- 49(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—
- (a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and
 - (b) before the earlier of the time at which the consumer—
 - (i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or
 - (ii) is required or expected to offer consideration for the transaction or agreement.
- (5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).

Any term that falls under the above would have to be drawn to his attention. Notice of such a term would therefore have to be displayed on the box of the computer program and in a conspicuous manner or in a website where the computer program is downloaded. It would also have to be written in plain language.¹⁴¹

the consumer to indemnify the supplier or any other person for any cause; or (d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).”

¹⁴⁰ This is contained in 49(2) which states “In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk— (a) of an unusual character or nature; (b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or (c) that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialing the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision. It will seldom be the case that a computer program is the cause of injury or death, but as it is theoretically not impossible, for sake of comprehensiveness this is included briefly.

¹⁴¹ S49(3).

Subsection 2 creates an even more onerous requirement in that the consumer must sign, initial or otherwise demonstrate his acceptance. One might expect that this would be difficult to do where there is no personal interaction between supplier and consumer or where the agreement is displayed on the computer only. However there are two things that assist.

Firstly, when considering the possibility of a signature, section 1(3) states: “If a provision of this Act requires a document to be signed or initialled by a party to a transaction, that signing or initialling may be effected in any manner recognised by law, including by use of— (a) an advanced electronic signature, as defined in the Electronic Communications and Transactions Act; or (b) an electronic signature, as defined in the Electronic Communications and Transactions Act.” An electronic signature is defined there as “data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature”¹⁴² The Supreme Court of Appeals recently delivered a laudably pragmatic judgment on the topic of electronic signatures in *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*.¹⁴³ It considered that the approach of the courts when dealing with signatures was that it should authenticate the identity of the signatory and not insist on a particular form being used. The typewritten names of the parties at the foot of the e-mails were held to constitute signatures in terms of the Electronic Communications and Transactions Act 25 of 2002.¹⁴⁴ While this is helpful in general, it will not normally come into play with the licence agreements considered

¹⁴² S1 of the Electronic Communications and Transactions Act 25 of 2002.

¹⁴³ 2015 (2) SA 118 (SCA).

¹⁴⁴ This decision is already being applied, as can be seen from the unreported judgment of *Rumarch Investment Holdings (Pty) Ltd v Old Fashioned Fish and Chips* (21168/2014) [2015] ZAGPPHC 170 (25 March 2015).

by this dissertation which are contracts of adhesion. This brings us to the second option.

The CPA permits acceptance to be demonstrated in some other way. A typical way in which acceptance of contractual terms is demonstrated electronically is by clicking. The agreement is displayed on screen when the computer program is installed and the consumer is requested to click on an option that indicates he accepts the terms of the agreement. It is suggested that this should be an acceptable way to demonstrate acceptance for the purposes of the CPA. Unfortunately, this will not always be effective as section 49(4)(b) read with 49(2) requires that acceptance be demonstrated before consideration is given by the consumer. If the computer program is distributed through the Internet, then the “click-wrap” agreement can be displayed on the website where the computer program is downloaded. Otherwise, if it is distributed through a retailer where no such interaction is possible, the supplier will be unable to comply with the requirements of this section.

This section is especially problematic for licence agreements discussed above in paragraph 2.6. That chapter considered the position of licence agreements that are only displayed after the consumer has purchased the product. Any of the terms described in section 49(1) that are included in such a licence agreement would automatically be prohibited by section 49(4).

The remedy for a consumer confronted by an exemption clause not meeting the above requirements is very simple: the court may either sever the provision from the agreement or declare that it has no force or effect with respect to the transaction.¹⁴⁵

The overall effect of this provision, however, is desirable inasmuch as it attempts to curb or restrict hidden exemption clauses and create clarity and legal certainty.

Ordinarily in our law a person is deemed to be bound to a document once he has signed it.¹⁴⁶ This concept of *caveat subscriptor* has not always been strictly enforced and a person can sometimes escape liability by stating that, irrespective of his signature, he made a *iustus error*.¹⁴⁷ The court's approach has not always been consistent in how to deal with unexpected exemption clauses, at times allowing or disallowing them without clear guidance.¹⁴⁸ Thanks to this clause the court now has the ability to sever these provisions where the Consumer Protection Act applies.

One other order that the court may impose should also be mentioned. Instead of severing the offending term, the court may instead declare that the entire agreement is void *ab initio*.¹⁴⁹ As the agreement is the vehicle through which the consumer receives the licence, this remedy should not be imposed. It will logically follow that if the agreement is void then the consumer will no longer have a licence in respect of the computer program. The copyright holder will then be able to exercise his rights in terms of the Copyright Act.¹⁵⁰

¹⁴⁵ S52(4)(ii).

¹⁴⁶ Van der Merwe 50.

¹⁴⁷ Pretorius 491.

¹⁴⁸ See *Mercurius Motors v Lopez 2008 (3) SA (SCA)*, *Brink v Humphries & Jewel (Pty) Ltd 2005 (2) SA 419 (SCA)*, *Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)* and *King's Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N)*. For a critical discussion in exemption clauses in cases, see Pretorius 491.

¹⁴⁹ S52(4)(a)(i)(bb).

¹⁵⁰ See the discussion above in paragraph 2.2.

3.8 Prohibited Terms

The last aspect on the contents of agreements that needs to be touched on is what the Consumer Protection Act prohibits. Broadly, any term or condition that seeks to thwart the Act is prohibited:

51. (1) A supplier must not make a transaction or agreement subject to any term or condition if—
- (a) its general purpose or effect is to—
 - (i) defeat the purposes and policy of this Act;
 - (ii) mislead or deceive the consumer; or
 - (iii) subject the consumer to fraudulent conduct;
 - (b) it directly or indirectly purports to—
 - (i) waive or deprive a consumer of a right in terms of this Act;
 - (ii) avoid a supplier's obligation or duty in terms of this Act;
 - (iii) set aside or override the effect of any provision of this Act; or
 - (iv) authorise the supplier to—
 - (aa) do anything that is unlawful in terms of this Act; or
 - (bb) fail to do anything that is required in terms of this Act;¹⁵¹

¹⁵¹ Numerous other terms are also prohibited. They are: "(c) it purports to— (i) limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier; (ii) constitute an assumption of risk or liability by the consumer for a loss contemplated in subparagraph (i); or (iii) impose an obligation on a consumer to pay for damage to, or otherwise assume the risk of handling, any goods displayed by the supplier, except to the extent contemplated in section 18(1); (d) it results from an offer prohibited in terms of section 31; (e) it requires the consumer to enter into a supplementary agreement, or sign a document, prohibited by subsection (2)(a); (f) it purports to cede to any person, charge, set off against a debt, or alienate in any manner, a right of the consumer to any claim against the Guardian's Fund; (g) it falsely expresses an acknowledgement by the consumer that— (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier; or (ii) the consumer has received goods or services, or a document that is required by this Act to be delivered to the consumer; (h) it requires the consumer to forfeit any money to the supplier— (i) if the consumer exercises any right in terms of this Act; or (ii) to which the supplier is not entitled in terms of this Act or any other law."

Any transaction, agreement, provision, term or condition is void to the extent that it contravenes section 51(1) because it is prohibited. Where the court is confronted by such a prohibited agreement or term, it has the power to either sever the offending term if that will make the agreement lawful, or to merely declare that the entire agreement is void.¹⁵² The significance of this section is that it renders the rights afforded by the Consumer Protection Act inviolable. The supplier will not be able to contract out of its application. It is repeated again, the remedy of declaring the agreement void should not be utilised for a licence agreement. It is preferable to sever the offending portion.

3.9 Implied Warranty on Quality

Before delving into the contents of the Consumer Protection Act, it would be helpful to see how problems in computer programs are dealt with by their developers. It is not that uncommon for a computer program to malfunction when used and sometimes these errors only occur under certain conditions which were unforeseen by the developers. These errors may be trivial or limit the functions of the computer program or they may be severe and render it unusable for a given consumer. This could lead to considerable business interruption losses or other consequences such as non-optimal production and lost profits. Due to the ease with which data can be transmitted through the Internet to the users of computer programs it is possible for the developers to prepare updates or upgrades, commonly referred to as “patches”, which corrects the computer program and in some instances also add additional features. From time to time developers will cease providing support for older products or versions thereof, effectively rendering them useless. This clearly impacts

¹⁵² S52(4)(a)(i).

on the lifespan of the product that the consumer might have been expecting to receive in exchange for its payment.

The Consumer Protection Act does not appear to consider the above situation at all and appears to have been drafted with corporeal goods in mind. As will be explained below, the remedies provided do not harmonise with industry conventions. The warranty protects the consumer in the following circumstances: (a) where the goods are not suitable for the purposes for which they are generally intended;¹⁵³ (b) are not of good quality, in good working order nor free of any defects;¹⁵⁴ (c) are not usable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply¹⁵⁵; and (d) do not comply with any applicable standards set under the Standards Act¹⁵⁶ or any other relevant public regulation.¹⁵⁷

One specific ground needs to be addressed in further detail: the warranty protects the consumer if there is a defect in the goods.¹⁵⁸ A defect is defined¹⁵⁹ as “(i) any material imperfection in the manufacture of the goods or components, or in the performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.”

¹⁵³ S55(2)(a).

¹⁵⁴ S55(2)(b).

¹⁵⁵ S55(2)(c).

¹⁵⁶ 29 of 1993.

¹⁵⁷ S55(2)(d).

¹⁵⁸ S55(2)(b).

¹⁵⁹ s53(1)(a).

It must be understood that it is normal that there are problems in computer programs. This is due to the complexity of them and the fact that they need to work on computers that are not all necessarily identical. It is always possible that an interaction between the components of an individual computer or other software installed on it may cause the computer program not to function as intended. This is why “patches” are often released after the release of a computer program. The Consumer Protection Act sets the standard that if the imperfection (etc.) is less than what “persons generally would be reasonably entitled to expect in the circumstances” then it is a defect. The fluid standard makes it difficult to see in a computer program what would constitute a defect. There will inevitably be problems, but which problems are significant enough that the consumer can rely on this subsection? More drastically, what of the situation where there is a defect but it will be fixed in a future patch or it already has (unknown to the consumer)? The “goods” he received will still have the defect and it is suggested he will still be entitled to exercise his remedies under the Consumer Protection Act.

Within six months of delivery of the goods the consumer may return the goods to the supplier who must either repair or replace the goods alternatively provide a refund to the consumer of the price paid by the consumer.¹⁶⁰ The consumer has an election as to which remedy to exercise.¹⁶¹

¹⁶⁰ S56(2).

¹⁶¹ S56(2).

These remedies have an interesting effect on computer programs. As was discussed above, a supplier is any person in the supply chain.¹⁶² On a simple reading of the provisions of the Consumer Protection Act an aggrieved consumer may return a computer program¹⁶³ to anyone from the retailer from whom it was purchased (who, it must be noted, has no control over the contents of the computer program) to the developer who initially created the computer program. The consumer may obtain a refund or a working copy. This latter aspect creates a problem for software developers specifically.

The consumer may insist that the software product be repaired by them. They would then be required by law to ensure that any errors are fixed. This warranty comes into operation from the date of delivery of the goods to the consumer – a consumer could purchase a product years after its initial release and be protected by the warranty. The developer would be required to provide support to that consumer and repair the computer program if it does not function. This is not unusual as over time the basic functionality of computers changes and older versions of software are not always compatible with newer versions of other software or hardware. Old computer programs that are no longer supported may still be covered by this section so long as the product was recently purchased by the consumer.

Another odd remedy to apply is that the consumer may insist on a replacement of the product. Corporeal goods in their manufacture may see flaws in individual items that are neither in the design of the product and is generally not found in other

¹⁶² See the definition of “consumer” in s1 of the Consumer Protection Act; also the application of the Act in s5 and s6.

¹⁶³ Comically, as licenses are also goods, if it should ever happen that a license agreement is defective it may also be returned. I look forward to the day that I bring the license to the retail store and insist that it be replaced with an adequate license.

examples of the product. An individual flawed item could be replaced with a working copy. A computer program is unlike other goods in that each copy is precisely the same as each other; there can be no variations. It is a futile remedy.

3.10 Applicability to Foreign Agreements

It may happen in a contract that a certain nation's laws are chosen to govern it.¹⁶⁴ When there is a such a foreign element then the court will need to decide which nation's laws apply and they make use of conflict rules, which are either multilateral or unilateral, to choose select the appropriate legal system.¹⁶⁵ This is especially important for retail software products. Although we do have businesses in South Africa that specialise in the development of bespoke software, many software products purchased in stores are developed in foreign countries. For these products the law chosen will usually be that of another country.

Multilateral rules typically consist of two elements, a category and a connecting factor. The problem is described under the category, such as which laws govern marriage's proprietary consequences, and the connecting factor will indicate which nation's laws are used to resolve it, the husband's domicile at the time of the marriage.¹⁶⁶

A unilateral rule however only indicates when a particular legal system applies. The example provided by Forsyth refers to s63(1) of the Insurance Act No 27 of 1943 which provides that when the owner of a domestic insurance provider enforces his

¹⁶⁴ De Villiers M 478 and Neels J 129.

¹⁶⁵ Forsyth 6.

¹⁶⁶ Forsyth 6 and Neels J 122.

rights against an insurer in South Africa, South African law will be applied. In this regard, Lewis JA took the following view in *Lloyds & others v Classic Sailing*¹⁶⁷

“[21] The general rule is that the choice by parties to a contract of the governing law – the proper law of the contract – is valid. However, legality is a question to be determined by the *lex fori* [the law of the forum where action is instituted]. The *ius cogens* (peremptory law) of the *lex fori* cannot be excluded. Our case law is sparse on this issue, but it is the general view of writers on the subject. And it must be that mandatory rules of the *lex fori* – especially legislative provisions – apply. Complete party autonomy cannot prevail over the provisions of a statute...”

Harms JA also considered the commentary by Forsyth and Voet which distinguished between peremptory or prohibitory statutes, which cannot be renounced, and dispositive statutes, which can. He however preferred an approach taken in the matter of *SA Co-Op Citrus Exchange v Director-General: Trade & Industry*¹⁶⁸ where it was held that a person may waive a right to his benefit except where it affects public policy or interest in a right. With such an approach the court found that the provision of law in question was designed to protect parties who are ignorant, careless or uneducated from unscrupulous insurers.

From that point of view it should not be open to parties to contract out of the statute by choosing another system of law to govern their contract.¹⁶⁹ The Consumer Protection Act is clear (more or less) on its applicability:

- 5(1) This Act applies to –
- (a) every transaction occurring within the Republic...
 - (b) the promotion of any goods or services, or of the supply of any goods or services, within the Republic...

¹⁶⁷ (250/09) [2010] ZASC 89 (31 May 2010).

¹⁶⁸ 1997 (3) SA 236 (SCA).

¹⁶⁹ Par 24.

By this section all courts in the Republic of South Africa will be obliged to apply the provisions of the Consumer Protection Act irrespective of any choice of law in the contract of the parties, so long as the licence agreement can be tied to the Republic of South Africa.¹⁷⁰

Two things will militate against the idea that the consumer might waive his rights under the Consumer Protection Act:

1. the Consumer Protection Act was created with the idea in mind to protect the consumer, especially the ignorant and illiterate;¹⁷¹ and
2. the Consumer Protection Act itself provides that any agreement which purports to waive a consumer's rights is unlawful.¹⁷²

Note, however, that the Consumer Protection Act does provide its own definitions for the words agreement, transaction and promotion. The places where these occur will not necessarily be the place where the contract was concluded and provides more grounds to ensure that there will be link in the Republic of South Africa to connect licence agreements to the South African Copyright Act.

This creates a potentially problematic situation that is not without its merit. No supplier will be able to contract out of the Consumer Protection Act's application by choosing another country's legal system as being applicable to the agreement in its

¹⁷⁰ Or as put by De Villiers M at 487: "Provided the transaction "occurred" within South Africa, the consumer act will apply regardless of the parties' choice of law." She also puts forth an argument that the Consumer Protection Act may apply whenever South African law is the *lex fori*, the law of the forum where the action is instituted. See also Neels J 130 who discusses the application of the CPA to foreign agreements more generally than this text does.

¹⁷¹ The preamble to the CPA.

¹⁷² S 51(1)(b)(i).

standard form contract. However, consider the position of the foreign suppliers. Their products are supplied here although the product and its accompanying licence agreement were created and drafted in their own country. If they are supplied in the Republic of South Africa those licence agreements and products must comply with the terms of the Consumer Protection Act. This could also mean that certain terms in those agreements, which would have otherwise been lawful, are now void.

On a final note, it is argued by Neels J¹⁷³ that where the proper law of contract (taking into account common law rules for determining the proper place of contract) provide a higher degree of protection, those protective measures should apply.¹⁷⁴ This argument appears to be sound and is agreed with.¹⁷⁵

¹⁷³ At 132.

¹⁷⁴ This is supported by s2(10) which states: "No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law." It must be noted that the common law will determine that the other legal system applies which will afford the higher protection.

¹⁷⁵ It is also referred to approvingly by De Villiers M at 488.

CHAPTER 4:

Conclusion

Licence agreements under the Copyright Act are not often examined in depth in South African jurisprudence.¹⁷⁶ With the ever-growing market for computer programs it may become an important topic, especially when we consider the changes introduced by the Consumer Protection Act. Insofar as it applies to licence agreements, the Consumer Protection Act considerably extended the rights of consumers as licensees not only against the retailers but also the original copyright holders who design, develop or release the product for sale.

Despite this, the first and most important thing to bear in mind is that the Consumer Protection Act does not apply to all licence agreements. For those licence agreements the ordinary laws pertaining to contract and copyright are applicable. These will normally be in respect of software sold to the state, large businesses and so on.¹⁷⁷ For them it is paramount that the contract be comprehensive and agreeable to them as they will not enjoy the protection of the Consumer Protection Act. These will in any case ordinarily be bespoke agreements arrived at after negotiation and they will not likely need that protection. For the ordinary consumer, the Consumer Protection Act is applicable.

When dealing with the actual formation of the contract and the application of the “ticket case” rules, the Consumer Protection Act has not fundamentally changed the law. Such contracts will still be valid. The structure of these agreements will however be impacted. Certain terms must be brought to the attention of the consumer before

¹⁷⁶ Dean, for example, spends less than two pages on the subject in his impressive textbook on copyright law.

¹⁷⁷ S 5(2).

he has purchased the computer program.¹⁷⁸ These terms must then be clearly visible on the packaging of the computer program. Although it was argued above that a licence agreement that is first displayed on installation of the computer program is valid, these terms will also still need to be conspicuously displayed on the packaging.

Terms that concern certain risks¹⁷⁹ require countersigning by the consumer or otherwise that he acts in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.¹⁸⁰ This must also be done before purchase of the computer program. This is something that is very difficult to prove or achieve with a contract of adhesion, especially when it must be done prior to a purchase in a physical store. If however the goods are sold and distributed via the Internet, the consumer could be alerted to the risks and he could be required to demonstrate acceptance by clicking on a designated image. This would likely satisfy the requirements of the Consumer Protection Act but it would also mean that there is a disparity between the possible terms of a contract depending on the distribution method chosen.

Certain terms are also expressly prohibited by the Consumer Protection Act. The powers of the courts have been described above and they may sever them from the agreement or declare it void *ab initio*. The former is remedy is welcomed; the latter may be unwise in this peculiar situation. It would be undesirable for the licence

¹⁷⁸ S49(1) read with 49(4)(b). These are, generally, terms that limit the liability of the supplier, constitute an assumption of risk on the part of the consumer, require the consumer to indemnify the supplier or constitute an acknowledge of any fact.

¹⁷⁹ S49(2). These include those of an unusual nature or character, those that could not reasonably expected or that could lead to serious injury or death.

¹⁸⁰ S49(2).

agreement to cease to exist, without which the consumer will not have a licence to continue using the computer program.

For licence agreements, which are generally dealt with as contracts of adhesion, additional requirements have been imposed. These contracts must be in plain language and broad guidelines have been given in the Consumer Protection Act on what will constitute plain language. This is a potentially helpful inclusion. Licence agreements are often lengthy and include technical legal terms that the ordinary consumer will not necessarily understand. Like any long agreement however, it is unlikely that anyone will ever read the agreement, plain language or not.¹⁸¹ If anyone does read it, they will be able to understand its contents.

Broadly the changes on the form of the agreement are desirable in that they try to limit terms and conditions in agreements that are disadvantageous to the consumer. Despite this advantage, they also have the consequence of making the exercise of drafting these contracts more burdensome on the part of the supplier.

Moving away from the form of the contract and to deal with its substance, the Consumer Protection Act has introduced a statutory warranty on goods. Due to the definition of “goods” including both licences and software it is clear that it was intended that they should also be protected by the Consumer Protection Act. Again, it must be noted, defining licences as goods creates utterly bizarre consequences. If the permission that you have received to use the computer program is defective, you may return it for a refund or a new permission. Computer programs can have defects

¹⁸¹ Reading license agreements is so uncommon that it has been satirised in a television program. South Park Season 15 Episode 1.

that may even cause it to be entirely inoperable. The definitions of what constitute defects are broad enough that the consumer will be able to easily rely on this portion of the Consumer Protection Act. In principal this is good.

Practically there are certain complications. Due to the fact that the Consumer Protection Act does not recognise how things normally work in the software industry, the remedies and grounds are not structured in a way that accommodates it or the nature of the goods. It does not recognise that corrections are made by software developers after a product is released into the market and its fluid definition of “defect” means that relatively minor defects may allow the consumer to exercise his remedies.

The remedies that are provided by it are strange when one tries to apply them to computer programs; it appears that no consideration was given to the nature of incorporeal goods when the section was drafted. One may request that the product be repaired or replaced. Replacement will have no use; every copy of the same computer program is identical to one another. Repair is a difficult remedy to enforce. Repair can only be enforced against the developer who has the source code¹⁸² of the computer program and therefore the ability to make changes to it. Ordinarily after a computer program is developed the product will be supported and patches will be developed to correct problems, meaning that it will be unnecessary. This is limited in

¹⁸² Source code is the version of the software that is written by a human in plain text (alphanumeric characters legible by humans). Before it can be used by a computer, it must be compiled into machine code (essentially binary, or 0's and 1'). These then form the instructions that the computer carries out when the computer program is used. It is nigh impossible to make changes to a computer program in its compiled form and one will need access to the original source code. Normally computer programs are distributed in their compiled forms and not as source code. The Linux Information Project “Source Code Definition” (23 May 2004) http://www.linfo.org/source_code.html (last accessed 20 August 2015).

duration however and after some years a product will no longer be supported. Theoretically, a consumer who has recently purchased a computer program can enforce this remedy against the developer years after the discontinuation of a computer program provided that he has recently purchased it.¹⁸³ He can also enforce this remedy against other persons in the supply chain, such as the retailer, irrespective of the fact that they lack the ability to repair it.¹⁸⁴

Despite the oddities above, the Consumer Protection Act does provide one other remedy in the form of a refund. This remedy can be immediately enforced without having to first require that the product be repaired or replaced.¹⁸⁵ In the context of a computer programs, this will likely be the only recourse that a consumer has against a defective computer program.

There is one other oddity that should be mentioned. It is possible that a “patch” has already been released correcting the defect in the computer program and the consumer may be unaware (or even aware) of it. Without installing the patch, the defect will remain. As the consumer has a choice in whether it wants to exercise the remedies of either refunding it or allowing the supplier to repair or replace, the consumer may still insist on a refund. Theoretically this creates the opportunity for a vexatious consumer to obtain a refund rather easily if one follows the following reasoning: If a patch exists for a computer program, then without the patch installed there are defects. Since there are defects, the consumer can insist on a refund. This is not an ideal situation.

¹⁸³ See the argument above in par 3.9.

¹⁸⁴ See par 3.2 above.

¹⁸⁵ S56(2)(b).

In general, introducing the remedy for a refund is not bad in principal. While it may be possible for a consumer to exploit it, it is a helpful remedy to have on hand, especially when a computer program is old, unsupported by the developers, and the consumer is unable to make use of it.

All of these will be problematic when it comes to dealing with computer programs from foreign countries. As argued above, the Consumer Protection Act will apply. Basic requirements, for example that the agreement must be in plain language, will be impossibly difficult to enforce. It does not appear that the Consumer Protection Act was drafted with the view in mind to litigate against external bodies. While one can always try to pursue them in foreign countries, this will likely be expensive and one will be limited to the remedies that can be exercised against other persons in the supply chain locally.

As a whole, it cannot be said that the Consumer Protection Act has had a completely benign impact on this niche field. The terms of the contract will likely be more beneficial to consumers. If they ever chose to read those terms, they will also be easier to understand. But it also introduces remedies that are mostly inapplicable; only one of them might possibly be effective. While it is necessary for legislation to keep up with the times and technological development, in this particular situation the changes brought to the law are not practical.

While the Consumer Protection Act is no longer new, it (along with the Company's Act 71 of 2008 and the recently introduced Copyright Amendment Bill 2015¹⁸⁶) is part

¹⁸⁶ Government Gazette 646:4, 27 July 2015 (Regulation Gazette No. 39028).

of a worrying trend of poor legislative drafting.¹⁸⁷ In the words of Karjiker S: “Government should fulfil its mandate. Those tasked to do something should do so competently. We do not require that those persons “#BeMoreMadiba” or some such popular refrain. Being mediocre would be enough for now.”

It is clear that the Consumer Protection Act had noble ideals in mind and it intended to be comprehensive in its coverage, specifically including software and licences under its expansive definition of “goods”. However, when one considers the practical implementation of its measures to those “goods,” one sees that it was never drafted in a way to consider how those “goods” function. The Consumer Protection Act, like this sentence, is incompl

Word count: 19 994

¹⁸⁷ Karjiker S “Let’s Pray for Mediocrity: Another Case of Legislative Diarrhoea” (3 August 2015) <http://blogs.sun.ac.za/iplaw/2015/08/03/lets-pray-for-mediocrity-another-case-of-legislative-diarrhoea/> (Accessed 10 August 2015).

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