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INFORMATION: PROTECTION, OWNERSHIP & RIGHTS

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EMPLOYMENT LAW LIBRARY

Information: Protection, Ownership and Rights

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Preface

It has always seemed strange to us that no text has attempted to draw together the various proprietary rights relating to information arising in the employment context. Although there are some excellent texts dealing with the specialist areas of intellectual property, confidential information and data protection, their impact and interrelation within the sphere of employment is barely addressed.

It has been estimated, for instance, that 80 per cent of patents emanate originally from the work of employees; confidential information abounds in companies; and rights to gain access to personal information held by employees have burgeoned in the 1980s. This level of activity brings with it problems both of maintaining secrecy and of establishing rights of ownership, use and access.

Our aim in this book has been to integrate those aspects of intellectual property rights and employment law which stand on common ground. In order to do this we have divided the text into three main sections: part I deals with the protection of confidential information; part II deals with intellectual property rights; and part III deals with the maintenance of confidential files. By a touch of serendipity this division roughly correlates with the title of the book: protection, ownership and rights. Where appropriate we have incorporated practical checklists either at the end of, or at suitable points in, each chapter.

We have not attempted to produce a general text on intellectual property and associated rights, merely to clarify their impact on employment law issues. We have, however, sought to summarise and explain the general principles wherever relevant.

Originally we had thought to produce precedent clauses which could be used by practitioners and employers in drafting contracts. With this in mind, together with a deal of curiosity to see how companies perceived the need to protect their secrets, we undertook two industrial surveys. The first was conducted by one of our research assistants, Miss Jane O'Brien. In this we asked companies two things: first, to detail how computer-held information relating to employees was collated and used, and secondly, what were their policies regarding medical reports and records. The results of this survey appear throughout the text in part III.

In the second survey we asked companies to send us their standard

employment contracts, or at least those extracts which related to the protection and use of confidential information and intellectual property. The results of this survey appear mainly in parts I and II. Having conducted this survey it appeared quite obvious to us that producing *one* 'model' clause on, say, confidentiality, was pointless. The different needs of the companies participating was a striking feature, even as between companies of the same size. Styles of drafting, company structures and demands of the market-place all contributed to the variety. Whereas one company felt secure with a clause which lasted two sentences, another company preferred the detail of two pages. We therefore abandoned the idea of 'model clauses' in favour of providing appropriate commentaries on the range of clauses utilised by companies and the efficacy of their wording.

Most of the companies which participated in these surveys were kind enough not only to answer our unsolicited requests by providing us with their standard contracts, but also sent explanatory notes on recent occurrences relating to their contracts. All but a handful of companies wished to remain anonymous in the text. Therefore we have decided that the best line to take is to preserve the confidentiality of all participants by ensuring that no company is identified.

Throughout the text we will refer to these surveys as the *ILU survey* because they were conducted as part of the activities of the Industrial Law Unit in the Faculty of Law of the University of the West of England at Bristol. No distinction will be made between the two surveys, though the statistical evidence used in part III was mainly compiled by Jane O'Brien in relation to the first questionnaire.

We owe a debt of gratitude to a number of people. First, to our colleagues and friends at Bristol and around the country who have patiently ploughed through some of our earlier drafts and benefited us with their advice and criticism: Professor Alan Bensted at Bristol, Professor Gerald Dworkin at King's College, London and Professor Robert Grime at Southampton University. Secondly, the help provided by John Bowers as general editor of this series has been very much appreciated. It hardly needs stating that any mistakes that still appear in the text are down to our obstinacy or incapacities. Thirdly, we would like to express our gratitude to Jane O'Brien for the professional way in which she conducted the first of the ILU surveys and for her compilation and analysis of all the data. And to Alistair MacQueen, Jonathan Harris and Heather Saward at Blackstone Press we would like to say thanks for all their support, faith and interest in the book; as well as for their friendship and lack of pressure over deadlines!

One of the enjoyable features of this research has been the enthusiastic cooperation of all the legal and personnel officers who provided us with data, contracts and comments for inclusion in the text. Though they remain anonymous in this work their help is valued greatly.

*Adrian Chandler
James Holland*

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1 Introduction: the Contract of Employment

In order to discuss the various information and intellectual property rights which touch upon the employment relationship we begin with a short description of the contract of employment. This introduction will outline the various features of the employment relationship, the discussion being pitched primarily at the matters considered in later chapters. Our aim is to demonstrate how the specific rights dealt with later in the text fit into the general picture of the employment relationship.

We have adopted the Harvard reference system in citing textbooks and articles whereby the author's name is followed by the year of publication and page number if appropriate. A short bibliography appears at the end of each chapter. Any references to the *ILU survey* relate, as we described in the preface, to the two surveys of companies we conducted through the Industrial Law Unit in the Faculty of Law at the University of the West of England, Bristol.

The book's theme of 'information' is divided into three parts. Leaving aside this introduction, Part I deals with the protection of confidential information and trade connections through the device of express and implied terms. Part II covers the more obvious intellectual property rights of patents, copyright and design rights. These possess a common feature in that the arguments centre more on ownership and rights of exploitation. Finally, Part III reverses the picture and is concerned with employees' rights of access to information and the consequent obligations imposed on employers.

Of course, there can be extensive overlaps between these topics. Hence, the trade secret so closely guarded by a company may, at some time, enter the public domain in the form of a patent; there will be specific rights relating to that information both before and after the granting of the patent. The more nebulous rights of confidentiality present in the development stages, for instance, may change to distinctive rights of ownership. Equally, there may be both copyright and confidential information rights relating to a drawing or a document. Hence, as the division of the topics is for the convenience of structure and analysis, we have tried wherever possible to note the overlap that may exist regarding the specific rights.

To this picture must be added the concerns and attitudes of employment